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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1455.~~ 1084

CHARLES E. CROSS AND SAMUEL C. WHITE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED FEBRUARY 1, 1889.

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1 *Venire and Title.*

STATE OF NORTH CAROLINA, *Wake County:*

Be it remembered that at a superior court held for the county of Wake, at the court-house, in the city of Raleigh, on the fourth Monday of March, it being the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-eight, before the Honorable W. M. Shipp, judge, upon the oath of B. P. Williamson, Eugene T. Jones, Simon Hopkins, C. H. Dupree, A. H. Davis, D. W. Crocker, Fabius Holloway, G. G. Maynard, E. S. Gattis, M. J. Maynard, R. E. Talton, George E. Gill, W. S. Ray, W. T. Bell, D. S. Avery, D. S. Beck, Elihuh Sater, and J. H. Olive, good and lawful men, of the county aforesaid, duly summoned, drawn, sworn, and charged to enquire for the State of and concerning all crimes and offences committed within the said county, it is presented in manner and form following—that is to say:

Bill of Indictment.

UNITED STATES OF AMERICA.

STATE OF NORTH CAROLINA, *County of Wake:*

Superior Court. March Term, A. D. 1888.

The jurors for the State, upon their oath-, present that Charles E. Cross and Samuel C. White, both late of the county of Wake
2 and State aforesaid, on the eighth day of March, in the year of our Lord one thousand eight hundred and eighty-eight, and within the jurisdiction of this court, at and in the county aforesaid, unlawfully and feloniously, of their own head and imagination, did wittingly and falsely make, forge, and counterfeit and then and there did wittingly assent to the falsely making, forging, and counterfeiting a certain promis-ory note for the payment of money; which said forged promis-ory note is of the tenor following—that is to say:

$6,250.00. MARCH 8TH, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payer or payee; and I do hereby appoint Sam. C. White, cashier, my
3 true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so

when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES.
W. H. SANDERS.

And upon the back of which said false, forged, and counterfeited promissory note is stamped and written—

Endorsement.

D. D. D. H. Graves. $6,250. July 8.

—with intent — defraud, contrary — the form of the statute in such case made and provided and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath- aforesaid, do further present that the said Charles E. Cross and Samuel C. White afterwards, to wit, on the day and year first aforesaid, to wit, the eighth day of March, in the year of our Lord one thoussand eight hundred and eighty-eight, at and in the county aforesaid, unlawfully, feloniously, and wittingly, did utter and publish as *ture* a certain false, forged, and counterfeited promissory note for the payment of money; which said false, forged, and counterfeited promissory note is as follows—that is to say:

4 $6,250.00. MARCH 8TH, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at the State National Bank of Raleigh, N. C., with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest notwithstanding any extention of time granted from time to time to the principal debtor, waiving all notices of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES.
W. H. SANDERS.

Upon the back of which said false, forged, and counterfeited promissory note is stamped and written—

5 D. D. D. H. Graves. $6,250. July 8.

—with intent to defraud, they, the said Charles E. Cross and Samuel C. White, at the time they so uttered and published the said

false, forged, and counterfeited promissory note, then and there well knowing the same to be false, forged, and counterfeited, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

And the juro-s aforesaid, upon their oath- aforesaid, do further present that the said Charles E. Cross and Samuel C. White afterwards, to wit, on the day and year aforesaid, to wit, the eighth day of March, in the year of our Lord one thousand eight hundred and eighty-eight, at and in the county aforesaid, of their own head and imagination, falsely, unlawfully, and feloniously did make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and did wittingly aid and assist in an assent to the false making, forging, and counterfeiting a certain other promissory note for the payment of money, the tenor of which said last-mentioned false, forged, and counterfeited note is as follow*i*th—that is to say:

$6,250.00. MARCH 8TH, 1888.

6 Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sure*ties*, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, North Carolina, with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received, being for money borrowed, the said sure*ties* hereby agreeing to continue and remain bound for payment of this note and interest notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim shall fall due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES.
W. H. SANDERS.

with intent to defraud then and there the State National Bank, a corporation then and there duly created and existing under the laws of the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

7 And the jurors aforesaid, upon their oath- aforesaid, do further present that afterwards, to wit, on the day and year aforesaid, at and in the county aforesaid, the said Charles E. Cross and Samuel C. White, being then and there evil-minded persons and unlawful- devising and intending to defraud the State National Bank of Raleigh, North Carolina, a corporation duly created and existing then and there under the laws of the United States, unlawfully and falsely did combine and conspire together to make, forge, and counterfeit and utter the promissory note hereinafter set

out, and by such false conspiracy and fraud feloniously, unlawfully, and falsely and wittingly did then and there falsely forge and make, and felonously and unlawfully did falsely cause and assent to be forged and made, a certain other promissory note for the payment of money; which said false, forged, and counterfeit promissory note is of the tenor following—that is to say:

$6,250.00. MARCH 8TH, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred & fifty dollars, negotiable and payable at State National Bank
of Raleigh, N. C., with interest, at the rate of eight per cent.
8 per annum, after maturity until paid, for value received, being for borrowed money, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney to sell any and all collateral he may *may* have in his hands to pay this claim if — should fail to do so when said claim falls due, after giving ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES.
W. H. SANDERS.

Upon the back of which said false, forged, and counterfeited promissory note is stamped and written D. D.; D. H. Graves; $6,250; July 8th, with intent to defraud, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

T. M. ARGO, *Solicitor.*

Whereupon the sheriff of Wake county is commanded that he
cause the said Charles E. Cross and Samuel C. White to come
9 and answer at the next term of said court.

Trial of Case.

And afterwards, to wit, at the term of said court held at the courthouse, in the city of Raleigh, on the second Monday of July, it being the ninth of July, A. D. one thousand eight hundred and eighty-eight, before the Honorable A. C. Avery, judge, cometh the said Charles E. Cross and Samuel C. White, each in his own proper person, and having heard the said indictment read, they and each for himself enter the following plea, the same being in words following, to wit:

Plea in Abatement.

Superior Court. July Term, 1888.

NORTH CAROLINA, *Wake County:*

STATE
vs.
CHARLES E. CROSS, SAMUEL C. WHITE. } Indictment: Forgery.

Plea in abatement to the jurisdiction of the court.

And the said Charles E. Cross and Samuel C. White, in their own proper persons, come into court here and, having heard the indictment in the above-entitled case read, do say—

That the said court here ought not to take cognizance of the conspiracy and conspiracies, forgery and forgeries, uttering and utterings in the said indictment specified, because—

10 Protesting, each for himself, that he is not guilty of the same as so averred, nevertheless the said Charles E. Cross and Samuel C. White each severally says—

That at the time of the alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings in said indictment specified there was a national banking association, duly organized and acting under the laws of the United States, in Raleigh, Wake county, North Carolina, known as the State National Bank of Raleigh, North Carolina, having its place of business and doing its said business in the said city of Raleigh, in the county of Wake and State of North Carolina, and within the jurisdiction of the circuit court of the United States for the eastern district of North Carolina.

That the said Charles E. Cross was then and there an officer of said bank, to wit, its president, and the said Samuel C. White was then and there an officer of said bank, to wit, its cashier.

That said alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings were made, entered into, committed and done by the said Charles E. Cross and afterwards assented to by the said Samuel C. White for the purpose of supporting, sustaining, and making a certain false entry and entries in the books

11 of said —, and that the said false entry and entries were by the said Samuel C. White, cashier as aforesaid, acting as cashier, actually made in and upon the books of the said bank, the said Charles E. Cross being then and there aiding and abetting for the purpose of deceiving and with the intent to deceive the agent of the United States, to wit, the bank examiner of the United States, duly appointed to examin- into the affairs of the said association, to wit, "The State National Bank of Raleigh, North Carolina."

That the said note in said indictment specified was never uttered or published in any way nor to any other person or corporation nor was there any intent or attempt so to do.

That the said note in the said indictment specified was entered upon and in the books of "The State National Bank" aforesaid as

the property of the said "The State National Bank of Raleigh, North Carolina," and placed among the assets by the said Charles E. Cross and Samuel C. White as aforesaid for the purpose and with the intent aforesaid.

The above facts the said Charles E. Cross and Samuel C. White are ready to verify.

Wherefore they pray judgement of the said court now here will or ought to take cognizance of this indictment here preferred
12 against them, and that by the court here they may be dismissed and discharged, &c., &c.

C. E. CROSS.
SAM'L C. WHITE.

Charles E. Cross and Samuel C. White, each for himself, and severally, makes oath that the facts set forth in the foregoing "plea" are true.

Sworn to and subscribed before me this 16th day of July, 1888.

CHAS. D. UPHURCH, *C. S. C.*

And thereupon comes Thomas M. Argo, solicitor, who prosecutes for the State in this behalf, and is allowed by the court to file the following paper as a demurrer to the plea of the defendants, the same being in words, to wit:

Demurrer of the Solicitor.

NORTH CAROLINA, *Wake County:*

STATE
vs.
CHARLES E. CROSS, SAMUEL C. WHITE. } Indictment: Forgery.

And T. M. Argo, solicitor, who prosecutes for the State in this behalf, as to the said plea of the said Charles E. Cross and Samuel C. White, by them first pleaded in the above cause, saith that the same is informal, repugnant, and vicious for duplicity, in
13 that it combines and confounds a plea of guilty in effect upon the merits with matter therein stated which is intended as a plea to the jurisdiction of this court, and that the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to preclude the said State from prosecuting the said indictments against them, the said Charles E. Cross and Samuel C. White, in this court, and that the said State is not bound by the law of the court to answer the same, and this the said T. M. Argo, solicitor, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, and the said T. M. Argo, solicitor for the State of North Carolina, prays judgement, and that the said Charles E. Cross and Samuel C. White may be convicted of the premises in the said indictment specified.

T. M. ARGO, *Solicitor.*

Order Refusing to Dismiss upon Plea.

Thereupon, after argument of counsel upon the motion to dismiss the action for want of jurisdiction, the court sustains the objections to the plea filed by the defendants and refuses the motion to dismiss the action.

The defendants excepts to the ruling of the court and insists upon the right of the defendants to appeal from the foregoing
14 ruling without proceeding further or before final judgment in the action. The court refused to grant an appeal from the refusal of the motion to dismiss. The defendants except also to the refusal of the court to grant the appeal.

And thereupon to the said bill of indictment the defendants each and severally sayeth that he is not guilty thereof, and of this they put themselves upon the country, and Thomas M. Argo, solicitor, who prosecutes for the State in this behalf, doth the like.

Therefore let a jury come of good and lawful men, by whom the truth of the matter may be better known.

And thereupon the following jurors, to wit, T. S. Jones, A. J. D. Cross, P. B. Barbee, John Rogers, Calvin Cope, J. W. Rowland, M. M. Perry, J. B. Faison, W. H. Pollard, W. T. Hodge, William Whitaker, and J. W. Chappell, being chosen, tried, and sworn to speak the truth of and concerning the premises in the said indictment specified; and thereupon, after examination of witnesses, argument of counsel, and charge of the court, the said jury retired in charge of a sworn officer to find their verdict.

And now in this case the following proceedings were had:

Through the officer appointed a communication was sent
15 to the court, the same being in words following, to wit:

"To his honor Judge Avery:

"It is impos-ible for us, the jury, to agree upon a verdict, and I respectfully ask your honor to relieve us. I have been suffering for a day or more with sick headache, caused by indigestion, and do not feel able to continue longer.

"Resp't., &c., W. T. HODGE.

"July 21st, 1888."

The court ordered that the jury be brought into open court. When the jury were brought into court the court, in the exercise of its discretion, in presence of the defendants, polled the jury. The defendants objected to the polling of the jury and excepted to the right to polle the jury by the judge.

In polling the jury the court first asked the jury, as a body, whether they could agree, and the foreman answered that "they" could not.

The judge then asked each juror, as the clerk called his name, "What say you, are the defendants or either of them guilty in manner and form as charged in the bill of indictment or not guilty?"

The manner of polling the jury is also excepted to by the defendants.

When the jury were polled in the presence of the prisoners
16 it appeared that all of the jurors had agreed that both of the defendants were guilty as to the first two counts in the bill of indictment, but two of the jurors said that they were not "guilty" as to the third and fourth counts of the bill of indictment.

Thereupon the solicitor proposed in the presence of the jury to enter a "*nolle prosequi*" as to the third and fourth counts in the bill of indictment. Counsel for defendants objected. The jury were sent out. Defendants' counsel addressed the court for some time.

After argument of counsel the solicitor was allowed to enter a "*nolle prosequi*" as to the third and fourth counts in the bill of indictment. The defendants excepted.

The jury are thereupon brought into court and informed by the court that the solicitor had entered a "*nolle prosequi*" as to the third and fourth counts in the bill of indictment, and they have only to pass upon the guilt or innocence of each of the defendants as to the first and second counts of the bill of indictment. The defendants excepted, and thereupon the solicitor, in open court, in the presence of defendants, says he will not further prosecute in the third and fourth counts of the bill of indictment. The defendants excepted again.

17 The jury retired in charge of the sworn officer, and thereupon the said jury come into court and for their verdict say that the defendants are guilty in manner and form as charged in the bill of indictment.

And thereupon T. C. Fuller, Esq., of counsel for defendants, moved the court that the jury be polled, and the said jury, being called each by name and asked by the court, "What say you, are the defendants or either of them 'guilty' in manner and form as charged in the bill of indictment or 'not guilty'?" And the said jury, each for himself, say "guilty."

And thereupon the defendants offer an exception in form as follows:

1st. "The defendants except to rendition and acceptance of the general verdict and in that it was not a special verdict finding the intent, when the court had ordered a special verdict."

And "for that, under the circumstances in the record herein stated, the verdict ought not to be accepted by the court and recorded as the verdict of the jury."

The court finds as a fact that the jury were "not ordered to find a special verdict."

Counsel say, and the judge, without any reccollection as to the matter and in deference to the assertion of counsel, admits, that the judge asked immediately, "Gentlemen, do you wish a special
18 verdict?" The court, however, explained to the jury "that they could pass upon each of the counts seperately."

The jury were retained in court till after the foregoing exceptions were tendered, and the court offered to poll the jury as to each of the remaining counts of the bill of indictment and enter the findings as to each of the counts. Counsel said that they did not wish to have the jury polled as to each count.

The jury were then discharged after entering their verdict in the presence of the prisoners.

The exceptions of the defendants is entered as explained by the foregoing statement.

Motion for a New Trial.

And thereupon the defendants moved the court for a new trial; motion refused.

Motion in Arrest of Judgement.

And the defendants move in arrest of judgement on the following grounds:

"1. The first count is defective in not averring an intent to defraud a particular person or corporation."

"This is defective under the statute of North Carolina which requires 'an intent to defraud any person or corporation, excluding an intent to defraud generally or to defraud the Government, which would be indictable as a distinct offence;' and this averment is bad at common law."

(See Whart. Cr. Law, 9th ed., sec. 744.)

"2nd. The second count is defective in not using the statutory term 'show forth in evidence which absorbs the common
19 law offence' of uttering. It also fails to aver of his own head and imagination, and also in not specifying the party intended to be defrauded."

Motion Overruled.

And thereupon, the solicitor for the State praying the judgment of the court—

Judgment.

It is considered and adjudged by the court "that the defendant, Charles E. Cross, now here, be confined at hard labor on the public roads of Wake county, under the direction of the commissioners of Wake county, for the term of (7) seven years, and that the defendant, Samuel C. White, now here, be confined at hard labor on the public roads of Wake county, under the direction of the commissioners of Wake county, for the term of (5) five years; and the sheriff of Wake county is charged with the execution of this sentence, into whose custody they are prayed.

Appeal to the Supreme Court.

From which judgement the defendants, each and for himself, appeal to the supreme court of North Carolina. Notice of appeal waived. An undertaking in the sum of fifty dollars on appeal adjudged sufficient.

By consent, defendants are allowed twenty days to serve statement of case on appeal, and the solicitor is allowed thirty days after service of such statement to except.

20 By consent of solicitor the defendants are allowed to give bonds in the sum of $10,000.00, justified security, each, to be passed upon by the clerk, for their appearance to the September term of Wake superior court, 1888, &c. Bonds filed.

Bond on appeal filed and herewith sent.

Statement of Case Agreed on Appeal.

STATE OF NORTH CAROLINA, *Wake County:*

July Term (Criminal), A. D. 1888.

STATE
vs.
CHARLES E. CROSS, SAMUEL C. WHITE. } Indictment: Forgery, &c.

Statement of case on appeal.

This was a criminal action tried before Avery, judge, and a jury, at July term, 1888, of the superior court.

The indictment as set out in the record being read to the defendants they pleaded to the jurisdiction of the court (see plea set out in the record); to which the State filed demurrer. (See demurrer in record.) The defendants claimed the right to open and conclude the argument in support of their plea; to which the solicitor objected; objection sustained; exception by defendants.

The court sustained the demurrer which had been filed by the solicitor and refused to quash and dismiss said indictment, and the defendants excepted. (Exception No. 1.)

21 The defendants then pleaded "not guilty." The solicitor introduced and read without objection the articles of association and the due incorporation and organization of the State National Bank of Raleigh, N. C.

SAM'L MCD. TATE, a witness for the State, then testified as follows: I am a national bank examiner, and have acted as such since last spring a year. On notice I came to Raleigh and took charge of the bank on Wednesday morning, I think—the next morning after it closed. I took charge of all the property in the State National Bank. I first saw the note offered in evidence (this was the note set out in the bill of indictment) in a file of notes, alphabetically arranged, in a box kept for notes. It was in the vault, put among the notes due to the bank—a part of the assets. I have seen some of the writing of Charles E. Cross.

I asked defendant Cross, when he sent for me to prison, why he did this—that is, put these forged notes among the assets of the bank; said I supposed he did that to fool me. He said, "O yes, of course." Mr. White was then present, but I think was just then talking with some one else. I am required to examine the bank once in twelve months, and oftener if demanded to do so by

22 the Comptroller of the Currency. I had examined this bank about nine months before it had closed. I associated Mr.

Stamps, as representing the directors, with me and examined cash and assets. I found this note among the notes filed as representing the assets of the bank. I examined the notes and found one with the name of William H. Avery and one Sanders signed to it. I found in the file of notes four notes submitted to the witness besides the one described in the indictment. The first note submitted is the one described in the bill of indictment.

The solicitor proposed to ask the witness whether the four notes submitted to the witness and said by him to have been found in the file of notes constituting the assets of the bank with the note alleged to have been forged were counterfeit or genuine.

This was offered to be taken in connection with other testimony tending to show the forgery by defendants of the note described in the bill of indictment.

Objection.—Objection at this stage sustained, and the court stated that the witness might be recalled after offering testimony as to the note described in the bill of indictment.

Mr. E. R. Stamps and F. H. Busbee were present when I first examined these notes. Perhaps it was Tuesday morning in-
23 stead of Wednesday. I left home on receipt of a telegram. I think that I reached Raleigh on Wednesday. I reached Raleigh about 6 o'clock a. m. Wednesday, and took charge of the bank soon after—the same morning.

Cross-examined:

I became an examiner in the spring of 1887. I examined this bank in two or three months thereafter.

The defendants proposed to show by this witness that the bank was insolvent when the witness examined it, and that it was insolvent when the defendant Cross took charge of it, and that during the administration of the defendant Cross as president, beginning in October, 1886, the condition of the bank was improved to the extent of fifteen per cent. in the amount of aggregate assets. This was offered to show the intent of forging paper, if it should be shown to have been forged, and especially as bearing upon the intent to show that the object and intent of the defendant Cross was not to defraud but to deceive the bank examiner and benefit the bank and its stockholders instead of defrauding the bank, as charged in some of the counts in the bill of indictment. The solicitor objected.

The objection was sustained and the defendants excepted. (Except. 2.)

24 Defendants proposed to show by the witness that when he took charge of the bank he found three thousand five hundred dollars in bills and thirteen thousand dollars in specie.

This is offered as tending to show that the defendants, when they left that amount of money in the bank that could easily have been appropriated and used by them, could have no intent to defraud the bank. Objection; objection sustained; exception by defendants. (Exception No. 3.)

Defendants proposed to ask the witness whether he found as much as two thousand dollars in the vaults of the bank in July, 1887, when he first examined the bank as an officer. This question was asked as bearing upon the question of intent.

Objection by the solicitor; exception by the defendants. (Exception No. 4.)

Witness stated: I cannot say, from my examination, that it is very definite, but I have some idea of the condition of the bank under the administration of Mr. Stamps, preceding that of Mr. Cross.

Defendants proposed to ask the witness whether he did not become as familiar with the condition of the bank under the administration of Stamps as under that of Cross. Objection by State; sustained; exception. (Excep. No. 5.)

25 Defendants proposed to ask the witness, When you and Mr. Stamps counted the cash how much did you find in the vault? The counsel contend that it was made competent by the statement of the witness in his direct examination that in taking charge he requested the directors to name some one to look into the amounts with him, and that Mr. Stamps was named and acted and examined the cash and amounts. Objection; sustained; exception. (Excep. No. 6.)

The witness said: I think I found that the Graves note was found entered on the books of the bank as a part of the assets.

When I arrived in Raleigh I found a number of the directors in the bank. Mr. Stamps and Mr. Primrose, Mr. E. H. Lee were there. I think Mr. Bailey was there then or came during the same morning. I think that during the morning all the board of directors but one came in. Mr. John G. Williams, Jordan Womble, young Mr. Bain, and Mr. Hal. Worth were there during the morning. I think that all of them camped there on the night before. They said that they had sat up all night the night before, taking care of the property until I could get there.

26 The solicitor offers in evidence the plea filed by the defendants in the case. (A copy sent up as a part of the record.)

D. H. GRAVES testified for the State:

I have seen the note offered (being the note set forth in the bill of indictment). I did not sign that note. I first saw it about the 30th of last March, after the bank had suspended.

I went to Canada as witness to effect the extradition of the defendants. I saw them at the police station at Toronto, Canada. They were prisoners then. There is no other D. H. Graves, as far as I know.

Cross-examined:

I do not know but have reason to believe that there is a man named D. H. Graves in Western North Carolina. That signature to the note does not resemble my signature in any respect. I have never been called on to pay any part of this note. I resided in

Selma; did business in Smithfield last March and for twenty years before. I am worth amount of note above exemptions and liabilities.

W. H. SANDERS testified for State as follows:

I saw this note first last March. I did not sign it nor
27 authorize any one to sign it. I do not know Mr. Cross or White. I am worth the amount of note above exemptions and liabilities; think Mr. Graves is also.

There are several men in my county who have the same initials. My son signs his name W. H. Sanders, Jr. I sign mine W. H. Sanders, Sr. There is an older W. H. Sanders—80 years old.

Cross-examined:

The old man signs his name William H. Sanders. Sometimes I get his letters. I sign my name Willis H. Sanders; he signs his William H. Sanders; my son signs his name Willis H. Sanders, Jr.

J. T. WALTON was introduced by the State.

The solicitor offers copy of note identified by S. McD. Tate as found among the file of notes and purporting to be signed by J. T. Walton, T. B. Walton, and George B. Costen. (A copy is attached.) It is offered to show the intention to defraud and establish the scienter as a part of evidence in connection with the forgery of the note described in the bill and for other notes identified by the witness Tate, and which it is proposed to show are forged in order
28 to show a scheme or con-piracy to defraud. The solicitor proposed to show first by this witness that the signatures are not genuine in order to make the note competent.

The witness testified that he first saw the paper last March. I did not sign that paper. My name is J. T. Walton. I am worth $500.00 above debts and exemptions. I know T. B. Walton; he is my cousin. Both live in Gates county. Defendant Cross previously lived there and knew me.

Cross-examined:

That does not resemble my signature at all. I do not know a J. T. Walton. I have heard of Waltons in Wake, some in Hertford and some in Camden. My name is James T. Walton. I sign J. T. Walton.

Redirect:

I know that defendant Cross knows me. I do not know whether he is acquainted with the other Waltons.

T. B. WALTON, for the State, testified as follows:

My name is T. B. Walton. I live in Gates county; have lived there all my life. I was acquainted with defendant Cross. He knows me.

I did not sign nor authorize any one for me to sign the note. I

first saw it last March. I am worth $3,000.00 above exemptions and liabilities.

29 Cross-examined:

The signature to the note does not resemble mine. I do not know whether the defendant Cross knows my signature or not. I knew other Waltons in Gates. I have never been called upon to pay any part of this note.

H. A. MORGAN testified for the State as follows:

I live in Gates county; have all my life; knew Charles E. Cross; have known him since he has been of much size; he has known me. I saw the note at last spring court. I did not sign that note nor authorize any one to sign it for me. I am worth amount of note above exemptions and liabilities.

Cross-examined:

The signature somewhat resembles mine. The general "make up" is like mine; especially the M. & H. is like mine. If I had time to examine I would say the signature was not mine. I have heard of "Morgans" in two or three counties of the State.

JAMES PARKER testified as follows (for the State):

I lived in Gates; have all my life. Charles E. Cross was raised three and one-half miles from me. (A copy of note signed
30 H. A. Morgan, James Parker, & C. O. Riddick put in evidence, copy marked D attached.) I did not sign the note. I am worth more than amount of the note above exemptions and liabilities.

Cross-examined:

The signature does not resemble mine. I know a great many "Parkers;" a good many who are named "James Parker."

C. O. RIDDICK testified:

I live in Norfolk and have lived there six or seven years. Previous to that time lived in Gates county; knew C. E. Cross; he knew me well. I did not sign that paper or authorize any one to sign for me. I was worth $5,800 above exemptions and liabilities last March.

Cross-examined:

The signature is not mine. There is very little resemblance to my handwriting. The C. and O. and k resemble my writing. The general character of writing is not like mine.

Note signed W. H. Avera and B. T. Barber put in evidence is one of those identified by witness Tate (a copy is attached, marked E).

B. T. BARBER testified for the State as follows:

31 My name is B. T. Barber. I did not sign the note. I have never seen it until now. I was here in March last. I am

worth the amount of the note, and was last March. I sometimes sold cotton and got a check on this bank in payment. W. H. Avery was Willis Avera. He died last year.

Cross-examined:

This resembles my signature very little. I do not know of but one W. H. Avera. I know of no such man in Harnett county.

D. S. AVERA, for the State, testified as follows:

I live in Raleigh; have for two or three years; formerly lived in Johnston county. I knew W. H. Sanders. The signature to the first note put in evidence is not his.

JOHN G. WILLIAMS, for the State, testified:

I am now clerk of the receiver of the State National Bank. I was clerk in the bank. I came into the bank in 1886, as clerk. I know the handwriting of C. E. Cross and Sam'l C. White. The Graves note (face of it) is is handwriting of C. E. Cross. I have seen Mr. Cross write a great deal; know his writing well.
32 I cannot say that I know the signatures to the note to be in the handwriting of C. E. Cross. They are not in his regular handwriting.

The solicitor now proposed to ask the witness whether or not it is his best judgment that the signatures were written by C. E. Cross, basing his opinion upon his knowledge of the handwriting of Cross; objection by defendants; overruled; exception. (Excep. No. 7.)

The counsel waived objection to it as leading, allowing it to be asked without regard to whether it was leading or not, leaving only the objection as to competency.

(J. G. W.) It is my opinion that the signature of D. H. Graves was written by C. E. Cross. I cannot say as to the other two. The body of the W. H. Avera and Barber note is in the handwriting of C. E. Cross, so far as it is written. I do not know who wrote the signatures. I have no opinion as to who wrote the signatures. The endorsement on it is in the handwriting of White. The endorsement on the Graves note is in White's handwriting.

The body of the J. T. Walton note (marke- C) is in the handwriting of C. E. Cross. The "T. B. Walton," I think, Cross
33 wrote. "The Geo. B. Coston" signature he did write. I have no opinion as to who wrote the J. T. Walton to that note. Sam'l C. White, defendant, wrote the endorsement on that note.

The H. A. Morgan note on the written part of the body is in the handwritting of C. E. Cross. "H. A. Morgan" is in the handwriting of defendant Cross, and so is "C. O. Riddick." I have no opinion as to who wrote "James Parker" to the note. The endorsement is written by Sam'l C. White on the back of the note.

I was not present when the notes were taken out of the vault, but came in while a list was being taken by Col. Tate and Mr. Stamps. The notes were found with the discounted notes.

Cross-examined:

I am a son of the late John G. Williams. C. E. Cross married my sister while I was at Bingham's school. It has been, I think, almost five years since he married. Samuel C. White was a brother of my mother.

The defendants propose to show by the witness that the State National Bank belonged to the Williams family, with the view
34 of arguing to the jury that there was no intent on the part of the defendants to defraud said bank. The solicitor objects to the testimony as irrelevant and incompetent. Objection; sustained; exception. (Excep. No. 8.)

Defendants proposed to ask the witness whether or not the State National Bank was insolvent and unable to pay its depositors when the defendant Cross became its president. Objection; sustained; exception. (Except. 9.)

The defendants asked the witness to state whether Mr. Stamps and the board of directors did not know that the bank was insolvent and not able to pay its depositors fifty cents on the dollar when Mr. Cross became the president of the bank. Objection; sustained; exception. (Except. 10.)

The defendants asked the witness to state whether the bank was not in a better pecuniary condition when Cross left it than when Mr. Stamps gave up the presidency of the bank. Objection; sustained; exception. (Except. 11.)

The defendants asked the witness, Do you know that on account of the insolvency of the bank the Comptroller of the Currency virtually forced Mr. Stamps to resign the presidency of the bank? Objection; sustained; exception. (Except. 12.)

35 The defendants asked the witness, Do you not know that Comptroller of the Currency refused to allow your mother and other members of the family to draw on the bank for their support. Objection; sustained; exception. (Except. 13.)

Do you not know that in consequence of such refusal by the Comptroller of Currency to allow the family to draw on the bank Mr. Cross contributed five hundred dollars out of his salary of $1,500.00 for the support of the family. Objected to; sustained; exception. (Except. 14.)

Witness stated that it was not unusual for the president or cashier to fill in the blank in a note.

D. D. meant "discounted debt." When so endorsed notes were put on the journal and constituted a part of the assets.

When notes were discounted it was proper for some one to endorse them as they are. They are endorsed in the handwriting of White.

I am twenty-two years old; have been in business since 1884.

I am certain about my testimony I have given as to handwriting. The signatures of H. A. Morgan, George B. Costen, and C.
36 O. Riddick, I think, are in the handwriting of C. E. Cross. My opinion is that "T. B. Walton" is written by Cross, but not inhis regular handwriting. I believe he wrote "D. H. Graves."

Defendants asked the witness, Do you not know that at one time during the past summer there was not more than one or two hundred dollars in the bank? Objection; sustained; exception. (Excep. 15.)

Defendants asked the witness, Don't you know that Cross and White had to make it a business during the cotton season of last year to run around the city and borrw money to keep the bank afloat? Objection; sustained; exception. (Except. 16.)

Defendants asked the witness, Do you not know that the estate of John G. Williams was and is now indebted to the State National Bank in the sum of $50,000 and upward and has nothing with which to pay it? Objection; sustained; exception. (Except. 17.)

Defendants asked the witness, Do you not know that when your father died he owed the State National Bank one hundred and twenty-five thoussand dollars by overdrafts and notes? This
37 and all similar questions are asked to show intent of the defendants, and that they did not intend to defraud the bank. Objection; sustained; exception. (Except. 18.)

Defendants asked the witness, Do you not know that after all of Mr. John G. Williams' estate was turned over to the State National Bank to pay his indebtedness existing at the time of his death it still left a deficit of fifty thousand dollars or upward? Offered for same object. Objection; sustained; exception. (Except. 19.)

Defendants asked the witness, Do you not know that before Mr. Cross became the president of the bank it was the common custom in the bank to make false entries upon the discounted notes on the books of the bank, just before the bank examiner came around, for the purpose of deceiving him? Offered for same reason. Objection; sustained; exception. (Except. 20.)

Defendants asked the witness, Do you not know that during the presidency of Mr. Stamps the overdrafts in the bank were never truthfully reported to the bank examiner? Offered for same purpose. Objection; sustained; exception. (Except. 21.)

38 Defendants asked the witness, Do you not know that during the presidency of Mr. Stamps false reports of the condition of the bank were continually made to the Comptroller of the Currency? Offered for same purpose. Objection; sustained; exception. (Except. 22.)

Redirect:

The book offered is the journal of the State National Bank; entries on page 397 put in evidence.

The entries are in the handwriting of Sam'l C. White.

Maj. C. Dowd, for the State, testifies as follows:

I am the receiver of the State National Bank. I do not think that I have had any conversation with defendant Cross in which he said anything about forgeries.

Hal. Worth, for State, was introduced.

The solicitor proposed to show by the witness that C. E. Cross,

after his return from Canada and while he was in the jail, stated to the witness that he had been in the habit, while president of
39 the bank, of forgeing and filling bogus paper or notes with the intent to deceive the bank examiner, and asked, What statement, if any, did defendant Cross make to you while in jail?

At this point, and pending the question whether the witness should be allowed to answer this question, the court stated that the four notes other than the note copied in the bill of indictment were in evidence. The court had understood them to be put in evidence as the witnesses were examined as to each and delivered testimony tending to show that they were forged by the defendant Cross.

Counsel for the defendants insisted that the notes had not been previously offered, so as to allow them an opportunity to object.

The solicitor now offers said notes especially as tending to show the scienter taken with other testimony and for other purposes.

The defendants were now allowed to object and the objections to — taken as if made at the earliest possible moment. The notes are introduced in evidence, and defendants except. (Except. 23.)

40 The solicitor stated that the notes were offered to show the scienter and intention and deliberate purpose and combination on the part of the defendants to defraud. This statement of the object of the solicitor was made at the request of the defendants' counsel.

Witness said: I served in the bank from first of January, first as a clerk, then as teller.

Cross-examined:

John Williams had the combination to the safe and could open it at any time; White and Cross were not here.

Redirect:

White and Cross told me that they had been in Canada. I first saw them after their return in jail. I saw them in the bank some hours before they left, on Saturday.

John Williams opened the vault on Monday morning. He and I expected "White and Cross" back at that time.

I do not know that Williams put any notes in the vault. White gave John the combination on Saturday; he had not had the combination before that. The president and cashier ordinarily
41 keep the combination. White and Cross kept it in this bank. The habit at that bank was to use the cash that came in one day to make the payments next day. If it gave out, then they went to the vaults for more cash.

Cross-examined:

Mrs. Williams had been president; had the combination. Her chambers communicated with the bank. Stamps had been president and was Mrs. Williams' son-in-law. I know that these two gentlemen had the combination; don't know who had it besides.

Monday morning I do not remember whether any other person was present when Mr. Williams opened the vault except Williams and myself.

Defendants proposed to show by the witness that the cash was counted and how much cash there was in the bank for the same purpose as in examination of other witnesses. Objection; sustained; exception. (Except. 24.)

The combination could have been changed. I did not have the combination. I was not teller till a few days before they left.

42 S. McD. TATE, for State, testified that all of the additional notes were assets of the bank. The witness had testified the same in chief.

Cross-examined:

It is very likely that notice may have been given that the charter could not be renewed without an examination of the bank.

A. P. C. BRYAN, for State, testified: I am agent for the Southern Express Company in the city of Raleigh; have been for over twenty-five years. I know when the defendants left for Canada.

Cross-examined:

I was once a director in this bank.

Defendants proposed to ask the witness whether he was the *bona fide* owner of ten shares of stock when he was a director. This is offered with the view of showing that there were irregularities throughout the history of the bank; and proposed to prove by other evidence that the bank was begun in fraud and run irregularly down to the time when defendant Cross took charge.

43 Objection; sustained; exception. (Except. 25.)

Defendants proposed to ask the witness if he knew what John G. Williams was worth at the close of the war, with the view of showing that John G. Williams sent the witness to Orange county and witness dug up for him ten thoussand dollars, and that was the only capital he had to start the bank, and the bank has been kept up on the money of the depositors. Objection; sustained; exception. (Except. 26.)

Defendants proposed to ask the witness if Mr. Cross did not tell him, soon after he took the presidency, that the bank was broken all to peices, and that certain persons named by him had gotten all of the money and had gotten him (Cross) into a trap from which he would be unable to extricate himself. Objection; sustained; exception. (Except. 26½.)

The foregoing, being all the evidence in the case, was introduced by the State.

The defendants asked the court to charge the jury—

To disregard all the evidence in this case and to return

44 a verdict of not guilty on the ground that, admitting said evidence and especially the plea to the jurisdiction of this court

filed by the defendants and put in evidence by the solicitor for the State, which said plea is made part of this prayer for instruction, it does not prove a case of which this court has jurisdiction; which was declined, and defendants excepted. (Except. 27.)

2. That if they find that the defendant-, Chas. E. Cross and Sam'l C. White, executed the note specified in the bill of indictment herein, under the circumstances and for the purpose set forth in their — to the jurisdiction of this court, which said plea has been put in evidence in this case by the solicitor for the State, that said defendants are not guilty, and they must render a verdict accordingly.

This was declined, and defendants excepted. (Except. 28.)

3d. That if they believe that the said Chas. E. Cross and Sam'l C. White executed said note under the circumstances and for the purpose mentioned in the plea to the jurisdiction of this court filed by the defendants, which plea has been put in evidence by the solicitor for the State, that said defendants, Chas. E. Cross
45 and Sam'l C. White, are not guilty of uttering the said note, as charged in the bill of indictment. This was refused, and the defendants excepted. (Except. 29.)

4. That it need- something more than proof of mere passive cognizance of fraudulent or illegal action of another to sustain a charge of conspiracy. There must be something to show active participation of some kind by the parties charged. If they should find that Chas. E. Cross did in fact forge the note specified in the indictment herein, and that said Sam'l C. White did not participate in or know of the making of said note, simply assenting to it after it had been executed, the court charges you that the said Sam'l C. White is not guilty of conspiracy, as charged in the bill of indictment; that a conspiracy must be by two persons at least. In an indictment for conspiracy against two the acquittal of one is an acquittal of the other; hence if the said Sam'l C. White did not participate in the making of the note herein alleged to have been forged by the said C. E. Cross the said White is not guilty of conspiracy as alleged in the bill of indictment in this case. The said White not being
46 guilty of conspiracy it follows that the said Chas. E. Cross cannot be guilty of the conspiracy, and you will return a verdict of not guilty on the fourth count in the bill of indictment as to both defendants. Refused; defendants excepted. (Except. 30.)

5. That if you find that the said Chas. E. Cross and Sam'l C. White did in fact make the false note specified in the bill of indictment herein, acting as president and cashier of the State National Bank of Raleigh, N. C., not for the purpose of benefitting themselves in any way, and that in fact they did not obtain any money thereby, but that they made said false note simply for the purpose of creating a false idea of the condition and solvency of said bank, that the said making the said false paper does not constitute forgery, and you will say that the defendants are not guilty. Refused; defendants excepted. (Except. 31.)

6. That the mere ex-ibition of a forged instrument to another or even passing it to another without a purpose to obtain something of

value therefor is not an uttering; hence if you find that the defendants merely placed the forged note—should you find that it was forged—among the assets of the State National Bank of
47 Raleigh, N. C., and that they were never in any way benefitted thereby, you will find the defendants not guilty on all the counts for uttering contained in the said bill of indictment herein. Refused; defendants excepted. (Except. 32.)

7. That the note specified in the bill of indictment in this case being found in the vaults of the State National Bank, of Raleigh, N. C., during the absence of Cross and White from the State of North Carolina, said finding said note in the vault of said bank was not a finding of said note in the possession of said defendants, and you will not be warranted in inferring from the said finding of said note in the vault of said bank that the defendants knew of, were guilty of, or were in any way connected with the making of said note. Refused; defendants excepted. (Except. 33.)

8. That as to the independent and collateral offences of forgery, if you find they were forgeries, put in evidence in *in* the case, the jury is to consider them with reference to the intent with which the note set forth in the bill herein was made, and to consider said collateral offences in that view and for no other purpose. Given.

9. That if you find that there was not such resemblance
48 between the genuine signatures of D. H. Graves and W. H. Sanders and the signatures annexed to the alleged forged note specified in the bill of indictment in this case as would deceive a man of ordinary intelligence and caution, and that said note, because of said want of resemblance, did not have any adaptation to accomplish a legal wrong, then you will pronounce the prisoners not guilty. Refused; defendants excepted (Except. 34.)

10. That if you find that the defendants are charged with having forged a note upon D. H. Graves and W. H. Sanders, and that the proof is that the note set forth in the indictment was forged only as to the name of D. H. Graves, which it bears, and it does not appear that the name of W. H. Sanders was a forgery, there is a fatal variance between the allegation in the bill of indictment and the evidence in the case, you will return a verdict of not guilty. Refused; defendants excepted. (Except. 35.)

The judge charged the jury as follows:

The bill of indictment contains four counts.

The first count charges that the defendants falsely forged, assented to the forgery, and aided and assisted in the forgery of
49 the note set forth in the bill of indictment "with intent to defraud."

In the second count of the bill the defendants are charged with publishing and uttering the forged and counterfeited paper set forth in the bill of indictment, knowing it to have been falsely forged and counterfeited, "with intent to defraud."

In the third count the defendants are charged with the same offence charged in the first, except that the intent charged in the

third count is not to defraud generally but to "defraud the State National Bank of Raleigh, N. C."

In the fourth count of the bill of indictment the defendants are charged with combining and conspiring to forge, falsely counterfeit, and utter the said note, and in pursuance of said combination and conspiracy did falsely forge and assent to the forging of said note.

2. Forgery at common law is defined as the fraudulently making or altering of a writing to the prejudice of the rights of another.

It may also be defined as the falsely making or altering of any written instrument for the purpose of fraud and deceit.

50 3. If the jury should be satisfied beyond a reasonable doubt, from the testimony, that either of the defendants forged or altered the note set forth in the bill of indictment with intent to defraud any individual or corporation whatever, then such defendants would be guilty as charged in the first count of the bill of indictment. Defendants excepted. (Except. 36.)

4. If the jury should be satisfied in the same way, beyond a reasonable doubt, that either of the defendants aided or abetted another in falsely forging or altering said note, or assented to the false forging or altering of said note after it had been forged by another, with intent to defraud any person or corporation whatever, such defendant would be guilty in manner and form as charged in the first count of the bill of indictment. Defendants excepted. (Except. 37.)

4½. If the jury have any reasonable doubt as to either defendant, whether he was guilty of either forging or aiding or abetting another in forging the said note, or of assenting to the forgery, or whether there was an intent on his part to defraud, the jury will return a verdict of not guilty.

51 5. In the second count of the bill of indictment the defendants are charged with uttering and publishing the note therein set forth,

To utter and publish a document is to offer, directly or indirectly, such document as good. To constitute the offence of uttering and publishing it is necessary that there should be a knowledge of the falsity of the document, and this is itself implied in an intent to defraud.

6. If the jury are satisfied beyond a reasonable doubt that either of the defendants did utter and publish the said note, knowing it to have been forged or altered, with an intent to defraud any person or corporation whatever, then such defendant would be guilty as charged in the second count of the bill of indictment, and the jury would so find. Defendants excepted. (Except. 38.)

7. The third count of the bill of indictment differs from the first count of the bill only in the fact that it charges the defendants with committing the offence with the particular intent to defraud the State National Bank of Raleigh, N. C., instead of "with in-

52 tent to defraud" generally. Apart from the question of intent, the charge in the first and third counts are the same.

8. If the jury shall be satisfied beyond a reasonable doubt as to either of the defendants that such defendants forged or altered the

said note, or aided or abetted another in forging or altering said note, or assented to the forging or altering of said note by another with intent — "defraud the State National Bank of Raleigh, N. C.," then the jury should find a verdict of guilty as to such defendant on the third count.

9. The fourth count in the bill of indictment charges a conspiracy to forge and utter, in pursuance of which they did forge the said note "with intent to defraud." A conspiracy is a combination of two or more persons to do an unlawful act, in pursuance of which conspiracy an unlawful act is done. The jury could not therefore find one of the defendants guilty and the other not guilty as charged in the fourth count. But unless the jury are satisfied that both are guilty, as charged in said count, of conspiracy and combina-
53 tion neither could be convicted as to the fourth count.

It is necessary that there should be something more than proof of mere passive cognizance of fraudulent or illegal action of another to sustain the charge of conspiracy. There must be evidence of active participation of some kind by a party in order to show him guilty of conspiracy, as charged in the said count.

10. The finding of the note (described in the bill of indictment and charged in the bill of indictment to have been forged) in the vaults of the bank was not such a finding in the possession of the defendants or either of them as would raise a presumption from the finding that the defendants or either of them forged the said note.

The jury can consider the fact, if proven, that the note was found in the vaults of the bank, together with any other facts that may have been proven showing or tending to show the previous connection of the defendants or either of them with the bank as bearing upon the question whether either of the defendants forged or altered or aided or assisted in forging or altering or assented to the forging or altering of the note.

54 Here the court gave paragraph (8) of the charge asked by the defendants.

11. If the signature of the name of D. H. Graves to the note did not resemble his own proper signature, that is a circumstance that the jury may consider in determining whether there was an intent on the part of either of the defendants to defraud D. H. Graves; but if the name of D. H. Graves was written by either of the defendants to said note for the purpose of defrauding any person, if either of the defendants assented to the writing of such name by another than Graves with said intent, then such defendant would be guilty, whether the signature bore such resemblance to that of said Graves as would probably deceive any person acquainted with his writing as to the genuineness or not. The rule in reference to the adaptation to deceive in such cases applies only to counterfeit money or currency or coin. Defendants except. (Except. 39.)

The defendants except to the refusal of the court to give the charge asked and to the instructions given in lieu thereof.

When the jury were brought into court at a subsequent
55 period the defendants excepted—

1st. To the right of the court to poll the jury. (Except. 40.)

2nd. To the manner of polling the jury. (Except. 41.)

3rd. To the order of the court allowing the solicitor to enter a *nolle prosequi* as to the third and fourth counts of the bill of indictment. (Except. 42.)

The solicitor offered to take a verdict of not guilty on the third and fourth counts of the bill, but the defendants declined.

4th. To the sending for the jury and informing them as to the *nolle prosequi*. (Except. 43.)

(All of these exceptions are more fully contained in the record.)

Thereupon the jury returned a verdict of guilty against the defendants on the first two counts in the bill of indictment.

The defendants moved for a new — upon the several grounds appearing in the record and in the case on appeal. Motion refused.

The defendants moved in arrest of judgement on the following grounds:

The first and second counts are defective in not averring an intent to defraud a particular person or corporation.

56 This is defective under the statute of North Carolina which requires "an intent to defraud generally or to defraud the Government, which would be indictable as a distinct offence; and this averment is bad at common law."

Judgment; from which the defendants appealed to the supreme court. Notice of appeal waived and undertaking in the sum of $50.00 adjudged sufficient. Undertaking filed.

By consent, defendants are allowed 20 days to serve statement of case on appeal, and the solicitor is allowed 30 days after service of said statement to accept.

(Signed by defendants' counsel.)

(Adopted by solicitor after insertion of amendments agreed to by defendants' attorneys.)

NORTH CAROLINA, *Wake County:*

In the Superior Court.

STATE
vs.
C. E. CROSS & SAM'L C. WHITE. } Appeal Bond.

Whereas in a criminal action pending in the superior court of Wake county judgment was rendered upon verdict against
57 the aforenamed defendants on the 21st day of July, 1888;

And whereas the defendants intend to appeal from such judgment to the supreme court:

Now, therefore, we, C. E. Cross and Samuel C. White and J. A. Jones, undertake, pursuant to the statute, that the said appellants

shall pay all costs that may be awarded against them on such appeal, not exceeding $50.

C. E. CROSS. [SEAL.]
SAM'L C. WHITE. [SEAL.]
J. A. JONES. [SEAL.]

Justification of Sureties.

WAKE COUNTY, *sct:*

Jesse A. Jones, above named, being duly sworn, say- that he is a resident of the State of North Carolina and worth double the sum specified in the above undertaking over all his debts and liabilities and exclusive of property exempt from execution.

C. E. CROSS.
SAMUEL C. WHITE.
J. A. JONES.

Sworn and subscribed before me the 26th day of July, 1888.
JAS. C. MARCOM, *J. P.*

58 *Exhibits.*

$6,250.00. MARCH 8*th*, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Samuel C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES.
W. H. SANDERS.

A true copy.
(C. D. U.)

59 $7,500.00. MARCH 7TH, 1888.

Ninety days after date I, W. H. Avera, principal, and B. T. Barber, surety, the other subscribers sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, seven thousand five hundred dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain

bound for payment of this note and interest notwithstanding any extension of time granted from time to time to the principal debtor, waiving all *all* notice of such extension of time from either payor or payee; and I do hereby appoint Samuel C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim fall- due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

W. H. AVERA.
B. T. BARBER.

A true copy.
(C. D. U.)

60 $5,800.00. MARCH 9TH, 1888.

90 days after date we, H. A. Morgan and James Parker and C. O. Riddick, the other subscribers sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, fifty-eight hundred dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam'l C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

H. A. MORGAN.
JAMES PARKER.
C. O. RIDDICK.

A true copy.
(C. D. U.)

61 $8,000.00. MARCH 10TH, 1888.

Ninety days after date I, J. T. Walton, principal, and T. B. Walton and Geo. B. Costen, sureties, the other subscribers sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, eight thoussand dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his

intention to sell the same, and pay any surplus that may remain to me.

J. T. WALTON.
T. B. WALTON.
GEO. B. COSTEN.

A true copy.
(C. D. U.)

62 STATE OF NORTH CAROLINA, *Wake County:*

I, Chas. D. Upchurch, clerk of the superior court of Wake county, do hereby certify that the foregoing contains a full, true, and perfect transcript of the record of said court in the case of The State of North Carolina against Charles E. Cross and Samuel C. White upon an indictment for forgery.

In testimony whereof I hereunto subscribe my name and affix the [SEAL.] seal of said court, at office, in the city of Raleigh, this 28th day of September, A. D. 1888.

CHAS. D. UPCHURCH,
Clerk Superior Court.

The transcript of which the foregoing is a true copy was filed in the supreme court of North Carolina on September 28th, 1888, and the case argued on October 17th and the following opinion delivered on November 5th thereafter:

63 *Judgment.*

WAKE COUNTY:

North Carolina Supreme Court. September Term, 1888.

STATE
vs.
CROSS & WHITE. } No. 131.

This cause came on to be argued upon the transcript of the record from the superior court of Wake county; upon consideration whereof this court is of opinion that there is no error in the record and proceedings of the said superior court.

It is therefore considered and adjudged by the court here that the opinion of the court, as delivered by the Honorable W. N. H. Smith, chief justice, be certified to the said superior court, to the intent that the judgment be affirmed; and it is considered and adjudged further that the defendants, Charles E. Cross, and Sam'l C. White, and surety for the appeal, J. A. Jones, do pay the costs of the appeal in this court incurred, to wit, the sum of thirty-eight $\frac{75}{100}$ dollars ($38.75), and let execution issue therefor.

A true copy.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

64 North Carolina Supreme Court, Wake County. September Term, 1888.

STATE
vs.
WHITE & CROSS (Appellants). } No. 131.

Opinion by Smith, C. J.

The defendants, Charles E. Cross and Samuel C. White, in an indictment found by the grand jury of the superior court of the county of Wake, are charged as follows:

"The jurors for the State, upon their oaths, present that Charles E. Cross and Samuel C. White, both late of the county of Wake and State aforesaid, on the 8th day of March, in the year of our Lord one thousand eight hundred and eighty-eight, and within the jurisdiction of this court, at and in the county aforesaid, unlawfully and feloniously, of their own head and imagination, did wittingly and falsely make, forge, and counterfeit, and then and there wittingly assent to the falsely making, forging, and counterfeiting a certain promissory note for the payment of money, which said forged promissory note is of the tenor following—that is to say:

$6,250.00. MARCH 8TH, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest, at the rate of eight per cent. per annum, after maturity until paid, for value received,
65 being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Samuel C. White, cashier, my true and lawful attorney to sell any or all collateral we may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES.
W. H. SANDERS.

And upon the back of which said false, forged, and counterfeited promissory note is stamped and written—

D. D. D. H. Graves. $6,250.00. July 8th—

with intent, to defraud, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

The second count charges the defendants with feloniously and

wittingly uttering and publishing as true a certain false, forged, and counterfeited promissory note for the payment of money, setting it out, in the same descriptive words as in the first count, "with intent to defraud," adding, "they, the said Charles E. Cross and Samuel C. White, at the time they so uttered and published the said false, forged, and counterfeited note, then and there well knowing the same to be false, forged, and counterfeited, contrary to
66 the form of the statute in such case made and provided and against the peace and dignity of the State."

The third is in all respects similar to the first count, charging the forgery, except that it concludes thus, "with intent to defraud then and there the State National Bank, a corporation then and there duly created and existing under the laws of the United States, contrary," &c., as before.

The fourth count charges a conspiracy with others to defraud the same bank by making, forging, and counterfeiting and uttering such promissory notes, "with intent to defraud," contrary, &c., as in the other counts.

At their arraignment for trial at the July term of said superior court the defendants put in a plea in abatement to the jurisdiction of the court, which is in these words:

And the said Charles E. Cross and Samuel C. White, in their own proper persons, come into court here and, having heard the indictment in the above-entitled cause read, do say—

That the said court here ought not to take cognizance of the conspiracy and conspiracies, forgery and forgeries, uttering and utterings in the said indictment specified, because, protesting, each for himself, that he is not guilty of the same, as so averred, nevertheless the said Charles E. Cross and Samuel C. White each severally says—

That at the time of the alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings in said indictment specified there was a national banking association, duly organized and acting under the laws of the United States, in Raleigh,
67 Wake county, North Carolina, known as the State National Bank of Raleigh, North Carolina, having its place of business and doing its said business in the said city of Raleigh, in the county of Wake and State of North Carolina, and within the jurisdiction of the circuit court of the United States for the eastern district of North Carolina.

That the said Charles E. Cross was then and there an officer of said bank, to wit, its president, and the said Samuel C. White was then and there an officer of said bank, to wit, its cashier.

That said alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings were made, entered into, committed, and done by the said Charles E. Cross and afterwards assen- to by the said Samuel C. White for the purpose of supporting, sustaining, and making a certain false entry and entries in the books of said bank, and that the said false entry and entries were by the said Samuel C. White, cashier as aforesaid, acting as cashier, actually made in and upon the books of said bank, the said Charles E. Cross

being then and there aiding and abetting for the purpose of deceiving and with the intent to deceive the agent of the United States, to wit, the bank examiner of the United States, duly appointed to examine into the affairs of the said association, to wit, the State National Bank of Raleigh, North Carolina.

That the said note in said indictment specified was never uttered or published in any way nor to any other person or corporation nor was there any intent or attempt to do so.

68 That the said note in the said indictment specified was entered upon and in the books of the State National Bank aforesaid as the property of the said The State National Bank of Raleigh, North Carolina, and placed among the assets by the said Charles E. Cross and Samuel C. White as aforesaid for the purpose and with the intent aforesaid.

The above facts the said Charles E. Cross and Samuel C. White are ready to verify.

Whereupon they pray judgment of the said court now here will or ought to take coguizance of this indictment here preferred against them, and that by the court here they may be dismissed and discharged, &c., &c.

C. E. CROSS.
SAM'L C. WHITE.

The plea is verified by their several oaths; and thereupon the solicitor, T. M. Argo, prosecuting for the State, enters a demurrer to said plea, which demurrer, upon argument, is sustained, and the defendants' motion to dismiss the action is denied and an appeal from the ruling at this stage of the proceeding refused; to all which rulings defendants except.

The defendants each and severally plead not guilty of the charges contained in the indictment.

Upon the issue thus joined upon the evidence, after argument and the charge of the court, the jury returned a verdict of guilty as to both defendants upon the two first counts of the indictment; and judgment being pronounced thereon, the defendants appeal to this court, assigning various errors to the rulings of the court during the progress of the trial.

69 The first exception is to the action of the court in sustaining the demurrer and disallowing the plea to the jurisdiction of the court.

It is insisted in the carefully prepared brief for the accused, laid before us, with an oral argument in its support and a large array of adjudications and other authorities, that (and we copy the words of the contention) "the State court has no jurisdiction over the case at bar. The false entries on the books of the State National Bank of Raleigh, N. C., are so false because based upon the forged notes. If the notes are not forged the entries are not false. To determine the falsity of said entries the Federal court has exclusive jurisdiction. If the State court be conceded jurisdiction to try the defendants for said forgeries; the Federal court cannot afterwards try the defendants for the false entries, the forgeries being integral and essential

elements in the false entries. The Federal court having exclusive jurisdiction to determine the falsity of the entries and to punish the makers thereof it follows that jurisdiction to try the defendants for said forgeries cannot be conceded to the State court."

The argument proceeds upon the assumption that the forgery, a misdemeanor of high grade under the laws of the State, being the means by which the false entries are made and by reference to which the falsity is determined, is so associated with the entries and so merges in them as a constituent element in the offence constituted and punished under the act of Congress as to oust the jurisdiction of the State court to try and punish the forgery as
70 a distinct and separate crime. We shall not question the correctness of the proposition which places the offence of making the false entry on the books of the bank under the sole cognizance of the courts of the United States and denies jurisdiction to the courts of the State, but we are unable to agree with counsel that this takes from the latter courts the right to try and punish for the distinct and independent crime made such by the laws of the State, notwithstanding the forged note was the instrument employed to give a false coloring to the entry and deceive one examining into the financial condition of the bank. If the note was genuine, but deposited in the bank with the understanding that it was to be surrendered to the makers or canceled as soon as the illegal purpose was accomplished, or if the entry showed a larger sum than was really due, ignoring the credits to which it was subject, and this was knowingly done with the same illegal intent, or if it had been made without the apparent support of any such paper of value, the entry would be false and deceptive and become a criminal offence under the act of Congress.

The forgery is not, then, a constituent part of the criminal act of making a false entry, though in the present case preceding the latter in time and comprehended in the general purpose formed to defraud and furnishing strong evidence of the unlawful intent in making the entries, and thus misrepresenting the resources and condition of the association when undergoing official examination.

Let us suppose the crime of forgery were a capital felony
71 or an offence punished with great severity and the making the false entry one of much milder grade, would the fact that the latter as cognizable in the Federal court, even when, as in this case, no jurisdiction has attached, deprive the State of its right to pursue and punish the offender for the infraction of its own laws in the committing of the higher crime? The question supplies its own answer, and as forgery and making a false entry are distinct and separate crimes the jurisdiction assumed over the one offence against the State law is entirely consistent with the exercise of a like jurisdiction over the other offence, made such by the act of Congress.

The numerous references made in the brief of defendants' counsel do not conflict with the foregoing view of the law applicable to the facts of the case that we have taken, as upon an examination will appear. The authorities are cited in the brief at page 14, and

those most favorable to the view taken for the defendants we propose to examine. It will be saen that none of them refer to distinct and conflicting jurisdictions, but to cases under a single jurisdiction.

In State *vs.* Shepard, 7 Conn., 54, it was decided that a conviction of an attempt to commit a rape under an indictment so charging was proper when the proof showed the rape was accomplished, and such conviction was a bar to another indictment preferred for the rape; and so it is held in State *vs.* Smith, 43 Ver., 324, and the general principle is laid down that where an offence is a necessary element in and constitutes an essential part of another offence,
72 and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other.

In Drake *vs.* State, 60 Ala., 43, which was an indictment for an assault with intent to murder, and under it a conviction of an assault and battery without a weapon (a *nolle prosequi* having been entered as to the felony charged) is not a bar to the charge of an assault and battery with a weapon when with leave of the court the defendant withdraws that plea and pleads guilty, and he cannot complain thereof. The court say in general terms that a single criminal act cannot be split up into two or more distinct indictable offences and prosecuted as such.

In State *vs.* Cooper, 1 Green, N. J., the prisoner was indicted as principal with two others as accessories for the wilful and malicious burning of a dwelling-house, and at the same time charged in another indictment, then found, with arson in burning the same dwelling-house and by means thereof mortally burning and killing one Joseph Hopper, who was in said dwelling. On the trial of the charge of arson the defendant was found guilty. The indictment for murder was then moved, whereupon the prisoner interposed the defence of a conviction of the offence of arson. The court sustained the plea, declaring that the killing being unintentional and a simple consequence of the burning the conviction for the burning was a bar to the second indictment charging a homicide as an accidental but not intended result, and that the offences were so essentially one that the prisoner could not be punished for the second imputed crime.

— the case of State *vs.* Chappen, 2 Swan., 493, it is held that
73 after a fine imposed for an assault a person could not be indicted for an assault and battery, there being but a single act.

In State *vs.* Shelly, 11 Lea, 594, it was held that a person swearing falsely in a case pending before a United States commissioner exercising his functions as such judicially could not be tried for the perjury then committed before the tribunal of a State, the jurisdiction vested in the Federal courts being exclusive. The same conclusion is reached and announced in State *vs.* Pike, 15 N. H., 83.

The principle is extended and applied to actions for a penalty given by an act of Congress in reference to license for retailing spiritous liquors in United States *vs.* Lathrop, 17 Johnson, 4.

We now proceed to consider the cases referred to in our own reports.

In State *vs.* Inglis, 2 Haywood, 148, the indictment for a riot and for beating and imprisoning one Barry was resisted upon the plea of a former conviction for an assault and battery grounded on the same facts. The court say that the State cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment and afterwards indict for the offence compounded of them all, and so the plea was held good.

In State *vs.* Lewis (a slave), 2 Hawks, 98, two bills of indictment were found against the prisoner at the same time, one for burglary and larceny, the other for robbery, and both charge the felonious taking of the same goods. On the first the prisoner was con-
74 victed of the larceny only. It was ruled that he could not be tried on the second indictment because it would be twice putting him in jeopardy for the same crime.

In State *vs.* Commissioners of Fayetteville, 2 Murphy, 371, the defendants were tried and convicted for not keeping one of the streets in the town of Fayetteville in repair, and there were three other streets in the same condition, for the neglect to repair which three other separate indictments had been found. The conviction was relied on as a bar to the other indictments and the plea was sustained. "It would be monstrous," says the court, "to charge them with separate indictments for every street in the town when the whole were out of repair at the same time, especially when upon one indictment a fine can be imposed adequate to the real estimate of the offence." The imputation is of negligence as a distinctive offence, though shown as applicable to different streets, just as an overseer is guilty of but one offence in neglecting to keep his road in repair as a whole and not of as many offences as there are parts of it out of repair and needing amendment.

So if a person has been tried for an affray he cannot again be prosecuted for an assault and battery committed in making the affray, State *vs.* Stanly, 4 Jones, 290, and similar ruling was made where the assault was made in a riot and given in evidence to prove the riot in an indictment for the latter offence.

None of these cases to which our attention has been given go beyond these adjudications, and they clearly recognize the distinction which we have drawn in examining the case before us where
75 the offences are not only cognizable in different tribunals, but distinct and independent themselves, of either one of which a party may be guilty and not guilty of the other. The principle is not affected by the fact that the spurious character of the note may supply forcible if not invincible evidence of the *mala fides* and fraudulent purpose of the act of the making the false entry. It is furthermore insisted that the forgery of the note, as a substantive crime, made as alleged to defraud the United States, can be prosecuted only in the courts of the United States under section 5418 of the Revised Statutes of the United States. The enactment is in these words: Every person who falsely makes, alters, forges, or counterfeits any bid, proposal, guarantee, official bond, public record, affidavit, or other writing for the purpose of defrauding the

United States or utters or publishes as true any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing for such purpose, knowing the same to be false, forged, altered, or counterfeited, or transmits to or presents at the office of any officer of the United States any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for such purpose, shall be imprisoned at hard labor for a period not more than ten years or be fined not more than one thousand dollars or be punished by both such fine and imprisonment.

Very similar in terms is section 5479 in the same, chapter 5 of title 70, entitled "Crimes against the operations of the Government."

76 From the entire context and the carefully constructed sentence or section itself, it is manifestly directed against frauds attempted to be perpetrated on the Government in its fiscal operations, as the entire chapter shows. The section nowhere mentions promissory notes for money securities held by banks or individuals against other business corporations or individuals, and the careful enumeration of the things to be forged and the leaving out bills and notes in which are formed relations between the debtor and payee or holder are significant of the scope and limitations of the enactment.

The expression "or other writing," following the enumeration, must find a restriction in the class to which it belongs and the obvious scope of the operation of the section as an entirety. It does not include, in our interpretation of the clause, "for the purpose of defrauding the United States," a commissioner sent to look into and report the condition of the bank, when it does not appear that the Government has any pecuniary interest in the matter and is only exercising, through this agency, a supervisory power over these institutions to secure their fidelity to duty and the safety of the public.

But if it be conceded that such a promissory note is embraced it is only such as are forged or counterfeited to defraud the United States, and an averment to that effect is necessary to withdraw such forgeries from the general jurisdiction of the State courts. Such notes alone are transferred to the jurisdiction of the Federal courts, leaving all others, where such intent does not enter into the criminal

77 act, to the judicial tribunals of the State. The absence of this indispensable prerequisite in any averment contained in the plea in abatement precludes the defendants from insisting that the forgery does not belong to the jurisdiction of the State, for it is not all forged notes that can only belong to and be tried in the Federal court, but such as are made for the unlawful purpose specified in the statute, and therefore the plea does not show an excluding jurisdiction and take away that of the court. See Coleman *vs.* Tennessee, 97 U. S. Rep., 509.

The exceptions numbered from 8 to 24, inclusive, are taken to the refusal of the court to permit evidence proposed to be given that the stock of the bank belonged to the family of the late John G. Wil-

liams, its founder, and to one of whose daughters the defendant Cross was married, while the defendant White was the brother of the widow of the deceased, and offered to repel the charge of an intent to defraud the bank; and, further, as to the previous condition of the bank under the management of former presidents.

We think the testimony was properly rejected. The simple inquiry was as to the alleged forgery of the note set out in the indictment and the fraudulent purpose for which it was intended to be used, and was in fact used in covering up the real condition of the institution and supplying spurious in place of its wasted resources. To this end the forgery was committed as a method of effectuating the purpose and placed as if genuine among the assets. This use of the paper involves the intent to defraud some one, and, under our statute, the Code, sec. 1191, a general charge of an intent to defraud, without designating the person or corporation intended to
78 be defrauded, is sufficient.

The intent to defraud is involved in the making and using the forged instrument as if genuine, and this purpose is not repelled by the existence of family relations among the parties, nor does the evidence tend to disprove the presence of the fraudulent intent in the act to which it is an inseparable incident. Whatever misconduct of others previously entrusted with its management may have led to the disastrous condition in which in assuming the presidency the defendant Cross found it, no defence nor extenuation in law is afforded by its necessities for the criminal act committed, and inquiries in that direction were wholly out of place in this prosecution.

Again, other notes alleged to be spurious and found among the assets of the bank the State proposed to prove in support of the charge of conspiracy and to show the scienter, and after objection was allowed to do so.

For this purpose only it was competent and for this purpose alone the proof was admitted; but it became immaterial, inasmuch as no conviction was had upon the charges it was offered to support.

We dispose of the other exceptions relating to the evidence with the single remark that they are equally untenable as the others, and we next proceed to examine the instructions which were tendered and refused, as also such as were addressed to the jury, so far as they are not embraced in what has been already said.

The first three refused instructions are of the class referred to in the preceding remark as having, in their import, been before examined.
79 The fourth relates to the charge of conspiracy, which is put out of the way by the verdict.

The fifth asserts as a proposition of law that if the note was forged, not for the benefit of the defendants, nor was any money obtained thereon, but merely to create a false idea of the condition and solvency of the bank, and the jury so believe, the defendants are not guilty.

5. The proposition is an erroneous statement of the law, for if the forgery was committed with a present intent to defraud, the offence

was complete whether the expected advantage was to accrue from it to the defendants personally or to another and whether the purpose was successfully attained or they failed in it.

6. The sixth instruction is substantially the same, as must be our ruling upon it.

7. The court properly declined to tell the jury that the finding the note among the assets of the bank after the departure of the defendants, was not a finding that defendants had had possession and warranted no inference that the defendants knew of, were guilty of, or were in any way connected with the making the note.

The tenor of the evidence did not authorize the giving any such direction and the jury were to draw their conclusions not from one isolated fact but from all that was shown.

9. If there was not such resemblance between the genuine and spurious handwriting of Graves and Sanders appearing in the note as would deceive a man of ordinary intelligence and caution, and for want of similarity in the signatures the forged note did
80 not have any legal adaptation to accomplish a legal wrong the prisoners could not be convicted.

This proposition would excuse an act of forgery in every case, even where the fraud had been consummated, when the person upon whom it was practiced was unacquainted with the handwriting of one whose signature it purported to be and who reposed confidence in the genuineness of the paper.

The variation in the writing may be evidence of the absence of an intent to defraud, but not when the intent has been developed in the act of defrauding.

It was in this case made payable to the bank and put in possession of the bank and there left when its doors were closed as part of its resources.

Besides, the variance was not so marked as to call for such a direction, nor does it find support in the case of State *vs.* Covington, 94 N. C., 913.

Precisely such an instruction was declined in that case, in words almost identical, and the ruling affirmed on appeal. Merrimon, J., speaking for the court, in the conclusion of his remarks upon this point, thus: "If, therefore, the false and fraudulent paper writing be such that it might from its nature and the course of business deceive or mislead to the prejudice of another person, the offence of forgery would be complete."

The remaining instruction refused was that if only one of the names signed to the note is shown to be forged and the evidence not satisfactory of the forgery of the other, there is a fatal variance, and the verdict must be for the defendants. The contrary has been expressly decided in the cases of State *vs.* Gardner, 1 Iredell,
81 27, and State *vs.* Davis, 69 N. C., 27, and we are content with a mere reference to them. It will conduce to a more correct understanding of these exceptions and the rulings upon them to reproduce so much of the charge delivered in place of that asked and refused as relates to the same subject-matter, and which is also excepted to in detail. After explaining the separate charges made in

the several counts of the indictment and defining the offence of forgery, the court says:

If the jury should be satisfied beyond a reasonable doubt from the testimony that either of the defendants forged or altered the note set forth in the bill of indictment with intent to defraud any individual or corporation whatever, then such defendant would be guilty as charged in the first count of the bill of indictment. If the jury should be satisfied in the same way beyond a reasonable doubt that either of the defendants aided or abetted another in falsely forging or altering said note, or assented to the false forging or altering said note after it had been forged by another, with intent to defraud any person or corporation whatever, such defendant would be guilty in manner and form as charged in the first count. If the jury are satisfied beyond a reasonable doubt that either of the defendants did utter and publish said notes, knowing it to have been forged or altered, with intent to defraud any person or corporation whatever, then such defendant would be guilty as charged in the second count. If the signature of the name of D. H. Graves to the note did not resemble his own proper signature, that is a circumstance that the jury may consider in determining whether there was an intent on the part of either of the defendants to defraud said Graves;
82 but if his name was written by either of the defendants to said note for the purpose of defrauding any person, or if either of the defendants assented to the writing of such name by another than Graves with said intent, then such defendants would be guilty whether the signature bore such resemblance to that of said Graves as would probably deceive any person acquainted with his handwriting as to the genuineness or not. The rule in reference to the adaptation to deceive in such cases applies only to counterfeit money or currency or coin.

We find nothing in this series of directions of which the defendants can justly complain, and what has been already said disposes of these exceptions also; but if there were an erroneous statement of the law in one particular, while it was correctly laid down in other parts of the single instruction, it would be unavailing according to our own and the rulings in the United States Supreme Court. Bost *vs.* Bost, 87 N. C., 477; Williams *vs.* Johnston, 94 N. C., 633; Johnson *vs.* Jones, 1 Black, 209; Linckon *vs.* Claflin, 7 Wallace, 132.

We have omitted to advert to the charge in so far as it refers to the second and third counts for the reason that no verdict was demanded or rendered on them, as will hereafter appear, and no harm has come to the defendants in consequence.

The last and remaining objection disclosed in the record has reference to what transpired at the rendition of the verdict. The facts are these:

The jurors having retired to consult upon their verdict sent a message through the officer put in charge of them, signed by
83 one of their number, to the effect that it was impossible for them to agree, and this juror stating that he had been suffering for a day or more with sick headache, caused by indigestion, and did not feel able to continue longer. The jurors were there-

upon brought before the court by order of the judge, and the court, in the exercise of its discretion, in the presence of the defendants, proceeded to poll the jury, to the doing of which the defendants excepted. In polling the jury the judge first enquired of the whole body whether they could agree, and the foreman answered that they could not. Then each juror, as his name was called, was asked, "What say you—are the defendants, or either of them, guilty in manner and form as charged in the bill or indictment, or not guilty?" To this exception was also taken. When the process of making the separate enquiry of each was concluded it appeared from the answers that all the jurors were agreed upon a verdict of guilty against both defendants upon the first and second counts, while two of the number were for finding them not guilty upon the third and fourth counts. The solicitor thereupon proposed, in presence of the jury, to enter a *nolle prosequi* to those counts. The jury withdrew, and, after argument from the solicitor, he was authorized to make the entry. Upon the return of the jury to the court-room they were informed by the judge of the allowance of the entry, and that they need only pass upon the charges contained in the first and second counts. After again retiring they returned in charge of the officer into court and for their verdict say the defendants are guilty.

The jury was again polled at the instance of the defendants'
84 counsel and asked, each juror, as to the verdict, and each responded guilty. Exceptions were made to each step taken in the action of the court; and, further, that the verdict, though so ordered by the court, was a general and not a special verdict. The court finds as a fact that the jury were not ordered to find a special verdict. While we do not approve of the mode adopted to ascertain the individual opinion of each juror before an agreement has been reached by the entire body, even to ascertain whether there are insurmountable difficulties in the way of arriving at unanimity, and they should be discharged, a discretionary power rested in the judge, because of its possible injurious effect upon the minds of the dissenting jurors, there is no error in law committed, and it is apparent no injury has come to the defendants by eliminating so much of the charge as was abandoned by the solicitor. He had no right to enter a *nolle prosequi* in its strict legal sense, which, like a nonsuit in a civil action, would leave the defendants exposed to another prosecution for the same offence. The action of the solicitor is miscalled, but in legal effect it was a consent to an acquittal of the accusations in the specified counts, and such is the result of a failure to render a verdict upon some of several counts in an indictment. State *vs.* Taylor, 84 N. C., 773; State *vs.* McNeill, 93 N. C., 552; State *vs.* Bower, 94 N. C., 910; State *vs.* Thompson, 95 N. C., 596. The last case shows also that a general verdict may be construed in the light of instructions given by the judge, and, though general in terms, will in legal effect be restricted to such alone of the
85 counts as the jury were directed to pass on—a ruling sanctioned in the case of State *vs.* Long, 7 Jones, 24, and State *vs.* Leak, 80 N. C., 403. The questioning of the jury revealed the fact of an entire unanimity upon the first two charges, the result of their

deliberation before coming into court, and a readiness to render a verdict accordingly. The abandonment of the others for the purpose of ending the cause was so far favorable to the defendants as to operate as a partial acquittal, and did not, nor could of itself, work any injury to them. State *vs.* John, 7 Iredell, 330. There was no reviewable error in what transpired, but the granting of a new trial after setting aside the verdict rested in the sound discretion of the presiding judge, which he has seen fit to exercise in refusing the application for it. The motions in arrest of judgment for supposed defects in the form of the indictment were properly overruled, for it substantially follows approved and recognized precedent, except so far as modified by statute, in reference to the averment of an intent to defraud, which it sanctions without further designation. We have thus carefully perused the record and examined the numerous exceptions taken during the progress of the trial, pressed with great earnestness in the argument on the appeal, in which a very thorough research among the reports and elementary writers has been apparent, and yet our convictions, as given in this opinion, are clear and strong that the accused have had an impartial trial, and the result must stand. There is no error, and the judgment must be and is affirmed.

A true copy.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

86 North Carolina Supreme Court.

I, Thos. S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled "State *vs.* Charles E. Cross and Samuel C. White," as appears of record in this court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in Raleigh, this the 30th day of January, 1889.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of North Carolina, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles E. Cross and Samuel C. White, appellants, and The State of North Carolina, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States

and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
88 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the first day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Justice Supreme Court of U. S.

[Endorsed:] Writ of error.

89 The United States of America to the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Carolina, wherein Charles E. Cross and Samuel C. White are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should, not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this first day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN M. HARLAN,
Justice Sup. Court U. S.

90 On this fourth day of December, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared before me, the subscriber, R. H. Bradley, marshal of the supreme court of North Carolina, and makes oath that he delivered a true copy of the within citation to Alfred M. Scales, Governor, and Theodore F. Davidson, attorney general, of the State of North Carolina.

R. H. BRADLEY,
Marshal of Supreme Court of North Carolina.

Sworn to and subscribed the fourth day of December, A. D. 1888.
[Seal of the Supreme Court of the State of North Carolina.]
THOS. S. KENAN, *S. C. C.*

[Endorsed:] Citation.

91 Know all men by these presents that we, Charles E. Cross, Sam'l C. White, and Thomas E. Cross, are held and firmly bound unto the State of North Carolina in the full and just sum of one thousand dollars, to be paid to the said State of North Carolina, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a supreme court of the State of North Carolina, in a suit depending in said court between Charles E. Cross and Samuel C. White, appellants, and The State of North Carolina, appellee, a judgment was rendered against the said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of North Carolina, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Charles E. Cross and Samuel C. White shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES E. CROSS. [SEAL.]
SAM'L C. WHITE. [SEAL.]
THOMAS E. CROSS. [SEAL.]

Sealed and delivered in presence of—
JOHN G. CROSS.
W. T. CROSS.

92 Approved by—
JOHN M. HARLAN,
Justice Supreme Court U. S.

This Dec. 1, 1888.
6—1493

Endorsed thereon is the following:

NORTH CAROLINA, *Gates County:*

Thomas E. Cross maketh oath that he is worth one thousand dollars over and above his liabilities and legal exemptions.

(Signed) THOMAS E. CROSS.

Sworn to and subscribed before me this 28th day of Nov., 1888.

[L. S.] W. T. CROSS,
Clerk Superior Court of Gates County, N. C.

I, N. J. Riddick, clerk of the circuit court of the United States, at Raleigh, N. C., do hereby certify that I know Thos. E. Cross, the surety whose name is signed to the within bond; that I believe him to be a responsible and solvent man, and that in my opinion the said bond is good and sufficient for the amount of within bond.

Witness my hand and official seal this the 30th day of November, 1888.

[L. S.] N. J. RIDDICK,
Clerk U. S. Circuit Court, E. D. N. C.

A true copy.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

Endorsed on cover: North Carolina supreme court. No. 1493. Charles E. Cross and Samuel C. White, plaintiffs in error, *vs.* The State of North Carolina. Filed February 1, 1889.

Supreme Court of the United States.

No. 1493.

CHARLES E. CROSS AND SAMUEL C. WHITE,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

Motion to Strike out Order of Advancement in said Case.

The plaintiffs above named come into Court now here by W. R. Henry, their attorney, and respectfully show to this honorable Court—

I. That heretofore, to wit, on the 5th day of November, 1888, final judgment was rendered against plaintiffs in error by the supreme court of North Carolina in the above-entitled case.

II. That in so rendering final judgment certain Federal questions were determined by said court adversely to said plaintiffs.

III. That on the — day of November, 1888, Hon. John M. Harlan, Associate Justice Supreme Court of the United States, upon petition of plaintiffs in error, granted a writ of error in said case.

IV. That the writ of error so allowed was made returnable on the second Monday in October, 1889, and a thousand-dollar bond required and filed for costs, &c.

V. That on the 1st day of February, 1889, and before the return day of said writ of error, a motion was made by Hon. Theo. Davidson, attorney general of North Carolina, to advance said case, having had the same docketed, which motion was allowed on the 4th of February, 1889, and said case set for hearing on the 18th day of March, 1889.

VI. That at the time said motion was submitted to this honorable Court plaintiffs in error were not present, either in person or by attorney, and had *no notice whatever* that such motion would be made. Wherefore the plaintiffs respectfully insist:

I. That a motion by defendant to *advance* a case upon the docket presupposes *legal notice* to the opposite party.

II. That though it be true that under the practice in this Court defendants have been allowed, before the day named for the return of the writ of error, to docket the case and move to dismiss the same for want of jurisdiction, it has never been the practice to advance a case *before the return day of the writ*, and to set a day to *hear* the case upon its *merits*.

III. That the writ of error having been made returnable on the second Monday in October, 1889, the plaintiffs are in equity and good conscience entitled to that time to prepare for the *hearing* upon its merits so important to their liberty and happiness, and that such seems to be contemplated by section 2 of rule 9 of the rules of the Supreme Court of the United States, there is provided, that "the plaintiff must file a copy of the record and have the case docketed within a certain time," and upon his failure to do so, then that "the defendant in error or appellee may do so at any time *thereafter*." Would it not be productive of great harm to set a day for the return of a writ of error, and thus cause plaintiff to think himself entitled to that time to make preparation, and then allow the Attorney General to have the case advanced without *any notice* of any kind to plaintiffs?

IV. If plaintiffs had opposed the motion to advance at the time it was made I take it that said motion would not have been granted. Plaintiffs are in no *laches*. They do oppose it at the first opportunity, and hope that they may be heard and not prejudiced by any matter which was in no way any fault of theirs.

VI. That there was not a total failure of said bank, as alleged in defendant's notice for advancement, for said bank has already paid over 47 cents on the dollar and has assets not yet exhausted; that there are other indictments, it is true, pending against plaintiffs in error, but it is expressly provided by the court below that they all abide the decision in this case, and that there shall be no cumulative sentence; that though when plaintiffs came back from Canada there

was some excitement, the trial below developed the fact that the bank had been insolvent for eight or nine years, during the administration of the affairs of said bank by other officers, who have thus far been free from prosecution, and consequently there is now but little interest taken in said case; that in no way under the law can it be made to appear to this Court that this case is one of "great public interest," or that it differs from any one of a hundred cases of forgery in North Carolina, so far as great public interest is concerned.

VII. That to hear the case now upon its merits may work great harm to plaintiffs in error, while to let it go over until the second Monday in October, 1889, the return day of the writ, cannot hurt the defendant.

Therefore the plaintiffs pray this honorable Court to strike out the order of advancement of said case.

They do not ask, however, that the docketing of said case be annulled, but that it may remain docketed to await further action in this behalf.

Respectfully submitted.

W. R. HENRY,
Attorney for Plaintiffs.

FILED,
MAR 14 1889
JAMES H. McKENNEY,
CLERK.

No. 1493.

In Supreme Court of the United States,

SPRING TERM, 1889.

CHARLES E. CROSS AND SAMUEL C. WHITE,
Plaintiffs in Error,

vs.

THE STATE OF NORTH CAROLINA.

ASSIGNMENTS OF ERROR.

BRIEF AND ARGUMENT OF

W. R. HENRY,

Of Counsel for Plaintiffs.

No. 1493.

In Supreme Court of United States,

SPRING TERM, 1889.

CHARLES E. CROSS AND SAMUEL C. WHITE,
Plaintiffs in Error,
vs.
THE STATE OF NORTH CAROLINA.

Assignment of Error.

Brief and argument of W. R. Henry, of Counsel for Plaintiffs.

And now come Charles E. Cross and Samuel C. White, jointly and severally, by W. R. Henry, their attorney, and complain that in the record and proceedings, and also in the rendition of the final judgment in a suit wherein said Cross and White were appellants to the Supreme Court of North Carolina, being the highest court of said State in which a decision could be had in said suit, and in which a final judgment was rendered against them on November 5th, A. D. 1888. In said suit certain Federal questions were presented, claimed and determined in said court and cause and the proceedings therein, and the decision thereof was adverse to and against the right, privilege, immunity and claim of plaintiffs, in the determination of which there was manifest error.

Section 709 of the Revised Statutes of the United States (page 133, second edition) provides as follows, to-wit:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or authority exercised under the United States, and the decision is against the validity; or where is drawn in question

the validity of a statute of or authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privileges or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined, and reversed or affirmed in the Supreme Court upon writ of error.

"The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

The transcript of the record in this case shows that,

I. There was an authority exercised by the Superior Court of the county of Wake, in the State of North Carolina, under the State, which was claimed by plaintiffs to be repugnant to the Constitution and laws of the United States, and that the decision, both of the Superior and Supreme Courts, was in favor of the validity of the authority so exercised.

II. Said transcript further shows that a right, privilege and immunity was claimed under the Constitution of the United States and the decision of the State Courts was against the claim.

III. Said transcript further shows that the State Court herein so construed the State law, Section 1029 of The Code of North Carolina, on the subject of forgery, as to make its operation in the case at bar unconstitutional.

IV. Said transcript further shows that the trial judge in polling the jury, as will more fully appear later on, violated the provisions of the 14th Amendment to the Constitution of the United States.

Section 1029 of The Code of North Carolina, Volume I, is as follows:

"If any person of his own head and imagination or by false conspiracy or fraud with others shall wittingly and falsely forge and make, or shall show forth in evidence, knowing the same to be forged, any * * *, promissory note * * * with intent in any of said instances to defraud any person or corporation, and shall be duly convicted, the person so offending shall be punished by imprisonment in the penitentiary, etc."

By Section 5209 of the Revised Statutes of the United States it is provided that

"Every President, Director and Cashier * * * of any (banking) association who makes any false entry in any book, report or statement of the association with the intent to injure or defraud the association, or any other company, body politic or corporate or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and any person who, with like intent, aids or abets any officer * * * in any violation of this section shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

The Federal Courts have exclusive jurisdiction of all such false entries as are denounced in the above section of the Revised Statutes of the United States, by virtue of Section 711 of said Revised Statutes. Set out Section 711—which is in the following language:

By Sections 5418 and 5479 of the Revised Statutes of the United States the forgery of "bonds, bids, guarantees, securities, or *other writings*, for the purpose of defrauding the United States, is denounced, and said offences so denounced are also within the exclusive jurisdiction of the Federal Courts by virtue of said Section 711, *supra*.

Having made the foregoing assignments of error, as appears upon the record, and cited the foregoing statutes and provisions of the Revised Statutes of the United States, the plaintiffs in error now beg to assign *more specifically* the errors aforesaid and to advance their argument upon the same.

PLEADINGS—CASE.

The transcript of the record herein shows that plaintiffs in error were indicted in the Superior Court of Wake County, N. C., in the following bill of indictment:

BILL OF INDICTMENT.

UNITED STATES OF AMERICA,
STATE OF NORTH CAROLINA,
County of Wake.

Superior Court,
March Term, 1888.

The jurors for the State, upon their oath, present that Charles E. Cross and Samuel C. White, both late of the county of Wake and State aforesaid, on the 8th day of March, in the year of our Lord one thousand eight hundred and eighty-eight, and within the jurisdiction of this Court, at and in the county aforesaid, unlawfully and feloniously, of their own head and imagination, did wittingly and falsely make, forge and counterfeit, and then and there did wittingly assent to the falsely making, forging and counterfeiting a certain promissory note for the payment of money, which said forged promissory note is of the tenor following, that is to say:

$6,250. MARCH 8th, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest at the rate of eight per cent. per annum after maturity until paid, for value received, being for money borrowed; the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, Cashier,

my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES,
W. H. SANDERS.

And upon the back of which false, forged and counterfeit promissory note is stamped and written—D. D.

D. H. GRAVES,
$6,250. July 8.

With intent to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Charles E. Cross and Samuel C. White afterwards, to-wit, on the day and year first aforesaid, to-wit, the eighth day of March, in the year of our Lord one thousand eight hundred and eighty-eight, at and in the county aforesaid, unlawfully, feloniously and wittingly did utter and publish as true a certain false, forged and counterfeited promissory note for the payment of money, which said false, forged and counterfeited promissory note is as follows, that is to say:

$6,250. MARCH 8th, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at the State National Bank of Raleigh, N. C., with interest at the rate of eight per cent. per annum after maturity until paid, for value received, being for money borrowed; the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any exten-

sion of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, Cashier, my true and lawful attorney, to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and paying any surplus that may remain to me.

D. H. GRAVES,
W. H. SANDERS.

Upon the back of which said false, forged and counterfeited promissory note is stamped and written:

D. D.—D. H. GRAVES.
$6,250. July 8.

With intent to defraud, they, the said Charles E. Cross and Samuel C. White, at the time they so uttered and published the said false, forged and counterfeited promissory note, then and there well knowing the same to be false, forged and counterfeited, contrary to the form of the statute is such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Charles E. Cross and Samuel C. White afterwards, to-wit, on the day and year aforesaid, to-wit, the eighth day of March, in the year of our Lord one thousand eight hundred and eighty-eight, at and in the county aforesaid, of their own head and imagination, falsely, unlawfully and feloniously did make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and did wittingly aid and assist in and assent to the false making, forging and counterfeiting a certain other promissory note for the payment of money, the tenor of which said last-mentioned false, forged and counterfeited note is as followeth, that is to say:

$6,250. MARCH 8th, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest at the rate of eight per cent. per annum after maturity until paid, for value received, being for money borrowed; the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, Cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES,
W. H. SANDERS.

With intent to defraud then and there the State National Bank, a corporation then and there duly created and existing under the laws of the United States, contrary to the form of the statute made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to-wit, on the day and year aforesaid, at and in the county aforesaid, the said Charles E. Cross and Samuel C. White, being then and there evil-minded persons, and unlawfully devising to defraud the State National Bank of Raleigh, North Carolina, a corporation duly created and existing then and there under the laws of the United States, unlawfully and feloniously did combine and conspire together to make, forge and counterfeit and ut-

ter the promissory note hereinafter set out, and by such false conspiracy and fraud feloniously, unlawfully and falsely and wittingly did then and there falsely forge and make, and feloniously and unlawfully did falsely cause and assent to be forged and made a certain other promissory note for the payment of money, which said false, forged and counterfeit promissory note is of the tenor following, that is to say:

$6,250. MARCH 8th, 1888.

Four months after date we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at State National Bank of Raleigh, N. C., with interest at the rate of eight per cent. per annum after maturity until paid, for value received, being for money borrowed; the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, Cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

D. H. GRAVES,
W. H. SANDERS.

Upon the back of which said false, forged and counterfeited promissory note is stamped and written—D. D. D. H. Graves, $6,250. July 8.

With intent to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. T. M. ARGO, *Solicitor.*

To which plaintiffs in error filed the following:

PLEA IN ABATEMENT TO THE JURISDICTION OF THE COURT.

And the said Charles E. Cross and Samuel C. White, in their own proper persons, come into court here, and, having heard the indictment in the above entitled case read, do say:

That the said Court here ought not to take cognizance of the conspiracy and conspiracies, forgery and forgeries, uttering and utterings in the said indictment specified, because:

Protesting each for himself that he is not guilty of the same, as so averred, nevertheless the said Charles E. Cross and Samuel C. White each severally says:

That at the time of the alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, in said indictment specified, there was a National Banking Association duly organized and acting under the laws of the United States, in Raleigh, Wake county, North Carolina, having its place of business and doing its said business in the city of Raleigh, county of Wake, and State of North Carolina, and within the jurisdiction of the Circuit Court of the United States for the Eastern District of North Carolina.

That the said Charles E. Cross was then and there an officer of said Bank, to-wit, its President; and the said Samuel C. White was then and there an officer of said Bank, to-wit, its Cashier.

That said alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, were made, entered into, committed and done by said Charles E Cross, and afterwards assented to by the said Samuel C. White, for the purpose of supporting, sustaining and making a certain false entry and entries in the books of the said Bank, and that the said false entry and entries were by the said Samuel C. White, Cashier, as aforesaid, acting as Cashier, actually made in and upon the

books of the said Bank, the said Charles E. Cross being then and there aiding and abetting, for the purpose of deceiving, and with the intent to deceive, the agent of the United States, to-wit, the Bank Examiner of the United States, duly appointed to examine into the affairs of said association, to-wit, The State National Bank of Raleigh, North Carolina.

That the said note in said indictment specified was never uttered or published in any way, nor to any other person or corporation, nor was there any intent or attempt so to do.

That the said note in the said indictment specified was entered upon and in the books of "The State National Bank" aforesaid as the property of the said "The State National Bank of Raleigh, North Carolina," and placed among its assets by the said Charles E. Cross and Samuel C. White as aforesaid for the purpose and with the intent aforesaid.

The above facts the said Charles E. Cross and Samuel C. White are ready to verify.

Wherefore they pray judgment if the said Court now here will or ought to take cognizance of this indictment here preferred against them, and that by the Court here they may be dismissed and discharged, &c., &c.

C. E. Cross,
Sam'l C. White.

Charles E. Cross and Samuel C. White each severally makes oath that the facts set forth in the foregoing "plea" are true. Chas. D. Upchurch, C. S. C.

To which plea in abatement the Solicitor for the State filed the following:

DEMURRER.

And T. M. Argo, Solicitor, who prosecutes for the State in this behalf, as to the said plea of the said Charles E. Cross and Samuel C. White by them first pleaded in the above cause, saith that the same is informal, repugnant and vicious for duplicity, in that it combines and confounds a plea of

guilty in effect upon the merits with matter therein stated, which is intended as a plea to the jurisdiction of this Court; and that the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to preclude the said State from prosecuting the said indictments against them, the said Charles E. Cross and Samuel C. White, in this Court, and that the said State is not bound by the law of the Court to answer the same, and this the said T. M. Argo, Solicitor, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, and the said T. M. Argo, Solicitor for the State of North Carolina, prays judgment, and that the said Charles E. Cross and Samuel C. White may be convicted of the premises in the said indictment specified.

T. M. ARGO, *Solicitor.*

I. THE QUESTION OF JURISDICTION OF STATE COURT OVER THE CASE AT BAR, AND FIRST ASSIGNMENT OF ERROR.

Plaintiffs in error contend that whereas one of them, at the time of the forgery set forth in the indictment, was President, and the other Cashier, of the State National Bank of Raleigh, North Carolina, and the notes alleged to be forged were made by the plaintiffs, not for their own benefit, but to sustain certain false entries made by them in the Bank, the object of which was to enable it to stand the test of a then impending official examination, and to give it time to collect its assets so as to be saved from insolvency, the State Court has no jurisdiction.

A.

SOME GENERAL PRINCIPLES.

Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction

of the laws of either. The same act may be an infraction or transgression of both. But when one of them, having supreme authority and jurisdiction, imposes a penalty on a specific offence, this excludes the jurisdiction of the other.

Moore *vs.* Illinois, 14 How. U. S., 13—20.
1 Wharton's Cr. L., sec. 264, *et seq.*
1 Bishop Cr. L., 988.

There are jurisdictional powers granted by the Constitution to the United States, yet not forbidden to the States. As to these the rule of construction is, that *until* Congress acts the States may exercise the full governmental authority, if the thing be within their territorial limits, but *after* Congress *has acted* the thing is or may be, by the National statute, *no longer* within the *jurisdiction* of the State Courts.

1 Bishop Cr. L., 172.
1 Wharton Cr. L., 266.
28 Alabama, 185.
4 Colorado, 46.

Under the Federal Constitution *exclusive jurisdiction* is vested in the Federal Courts of all offences cognizable under the authority of the United States, unless where the laws of the United States shall otherwise direct. State Courts may exercise jurisdiction in cases authorized by the laws of the State and not *prohibited* by the *exclusive* jurisdiction of the Federal Courts.

Wharton's Cr. L., sec. 264.
Houston *vs.* Moore, 5 Wheaton, 27.
U. S. *vs.* Ames, 9 Boston L. R., 295.

In Massachusetts it is said that the enactment of a Federal statute directing the punishment of a crime as against the United States excludes all State jurisdiction, unless the concurrent jurisdiction of the State judiciary be *saved* in the statutes.

"By the terms of the Judiciary Act," said Ames, J., in the Supreme Court of Massachusetts, on this point, "the Courts of

the United States are vested with the *exclusive* cognizance of all crimes that are made punishable by act of Congress, except where the act of Congress makes other provisions; and it would therefore seem that the crime of embezzlement by a bank cashier of a National Bank located within our territory is taken out of the jurisdiction of the State Courts. * *"

Com. *vs.* Tenney, 97 Mass., 50.
Com. *vs.* Felton, 101 Mass., 204.
Com. *vs.* Fuller, 8 Met., 313.
State *vs.* Fuller, 34 Conn., 280.

Where the offence falls equally within the inhibitions of the State law and a law of Congress it can be punished only under the act of Congress.

2 Bish. Cr. L., sec. 383 and cases.

In Virginia it has been decided that the Courts of that State have no jurisdiction of stealing packages from the mail, that being an offence created by act of Congress.

Com. *vs.* Feely, 1 Va. Cases, 321.

And the same view was taken in an action brought to recover a penalty for a breach of the revenue laws, notwithstanding such penalty being expressly made recoverable in the State Courts.

Serg. Cons. Law, 280.

See also, the case of Haney *vs.* Sharp, 1 Iowa, 442.

Says the Supreme Court of Connecticut in the case of Ely *vs.* Peck, 7 Conn., 240:

"In this State, as well as in Massachusetts, it is now held that criminal offences against the Federal Government are exclusively cognizable in Federal Courts, unless by Federal statutes it is otherwise provided."

State *vs.* Fuller, 34 Conn., 280.

It may be contended that the clause or clauses of the Constitution, and the Special Act of Congress, upon which plaintiffs in error rely for protection from the State Court, are not specifically alleged.

This is no longer necessary under the following authorities.

"A party relying on this Court for re-examination and reversal of the decree or judgment of the highest State Court need not set forth specially the clause of the Constitution of the United States on which he relies.

"If the pleadings make a case which necessarily comes within the provisions of the Constitution, it is enough. The true rule is that the Court must be able to see from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party."

1 Wallace, 116; 8 Wallace, 56.
4 Wheat, 311; 11 Wallace, 204.
96 U. S, 432; 96 U. S., 442.

From the foregoing principles we feel warranted in drawing our

B.

FIRST PROPOSITION.

The State Court has no jurisdiction over the case at bar. The false entries on the books of the State National Bank of Raleigh, N. C., are so false because based upon the forged notes. If the notes are not forged the entries are not false. To determine the falsity of said entries the Federal Court has the exclusive jurisdiction. If the State Court be conceded jurisdiction to try defendants for said forgeries, the Federal Court cannot afterwards try the defendants for the false entries, the forgeries being integral and essential elements in the false entries. The Federal Court having exclusive jurisdiction to determine the falsity of the entries and to punish the makers thereof, it follows that jurisdiction to try the defendants for said forgeries cannot be conceded the State Court.

ARGUMENT.

By Section 5209, *ante*, of the Revised Statutes of the United States, said section *not being included* in title 70 of said Crime

Act, it is provided that, "Every President, Director, Cashier, * * * Agent, etc., of any [banking] association, * * * who makes any *false entry* in any book, report or statement of the association, with intent in either case to injure or defraud the association or any other company, body politic, or corporate, or any individual person, *or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association*, and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The exclusive jurisdiction of Federal Courts over misconduct by officers of National Banks, as such, rests on broad grounds of policy, which should be considered in construing statutes determining such offences. The National Bank system is on these grounds put on the same footing as the revenue system, and the reasoning which excludes State interference with offences against the revenue system applies to offences against the National Bank system. Thus it has never been pretended that such incidents of smuggling, as if they were independent offences would be cognizable in the State Courts, are so cognizable when they are so incidental to smuggling. Thus a State Court cannot take jurisdiction of an assault on a revenue officer, which is part of a smuggling adventure, though it would be otherwise if the assault was on a private individual and not incidental to a smuggling adventure. The reason is that if the State Courts had jurisdiction not only would we have as many constructions of our revenue statutes as we have States, but revenue prosecutions would be absorbed by State prosecutions. If, for instance, a State Court took cognizance of the assault on a revenue officer, and if in such case the offender should be acquitted, this, if the jurisdiction was conceded, would bar the Federal prosecution, wherever such assault was an essential incident to the offence. It would not be

necessary, therefore, in order to nullify an obnoxious Federal revenue statute for the State to pass a statute of nullification. All that would be needed would be for the State to prosecute for some integral element of the offence and then to have an acquittal. And even if there should be a conviction, serious difficulties would be in the way of a Federal prosecution. *So would it with prosecutions under the National Bank law if integral incidents of such prosecutions could be taken possession of by a State Court and then prosecuted to a conviction or acquittal. The forgery of the notes here in question was but an incident to the entry of such notes as part of the assets of the Bank. If the notes were not forged, then the entries were correct; it is an essential element of the falsity of the entries that the notes should have been forged. Hence, if the State Court has jurisdiction, an acquittal in that court of the forgery bars the Federal prosecution for false entry.* And this is in accordance with the settled rule that a prosecutor, by selecting a special and essential incident of an offence for prosecution, is barred as to the aggregate offence, by an acquittal of such incident, as, for instance, if he prosecute for assault, instead of an assault with intent to kill, the verdict in the former charge, if the Court has jurisdiction, will bar a prosecution of the latter charge.

In State *vs.* Shepard, 7 Conn., 54, it was decided that a conviction of an attempt to commit a rape under an indictment so charging was proper when the proof showed the rape was accomplished, and such conviction was a bar to another indictment preferred for the rape; and so it is held in State *vs.* Smith, 43 Ver., 324, and the general principle is laid down that where an offence is a necessary element in and constitutes an essential part of another offence, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other.

In Drake *vs.* State, 60 Ala., 43, which was an indictment for an assault with intent to murder, and under it a conviction of an assault and battery without a weapon (a *nolle prose-*

qui having been entered as to the felony charged) is not a bar to the charge of an assault and battery with a weapon when with leave of the Court the defendant withdraws that plea and pleads guilty, and he cannot complain thereof. The Court say in general terms that a single criminal act cannot be split up into two or more distinct indictable offences and prosecuted as such.

In State *vs.* Cooper, 1 Green, N. J., the prisoner was indicted as principal with two others as accessories for the wilful and malicious burning of a dwelling-house, and at the same time charged in another indictment, then found, with arson in burning the same dwelling-house and by means thereof mortally burning and killing one Joseph Hopper, who was in said dwelling. On the trial of the charge of arson the defendant was found guilty. The indictment for murder was then moved, whereupon the prisoner interposed the defence of a conviction of the offence of arson. The Court sustained the plea, declaring that the killing being unintentional and a simple consequence of the burning, the conviction for the burning was a bar to the second indictment charging a homicide as an accidental but not intended result, and that the offences were so essentially one that the prisoner could not be punished for the second imputed crime.

In the case of State *vs.* Chappen, 2 Swan., 493, it is held that after a fine imposed for an assault a person could not be indicted for an assault and battery, there being but a single act.

In State *vs.* Shelly, 11 Lea, 594, it was held that a person swearing falsely in a case pending before a United States Commissioner exercising his functions as such judicially, could not be tried for the perjury then committed before the tribunal of a State, the jurisdiction vested in the Federal Courts being exclusive.

In State *vs.* Inglis, 2 Haywood, 148, the indictment for a riot and for beating and imprisoning one Barry was resisted

upon the plea of a former conviction for an assault and battery grounded on the same facts. The Court say that the State cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment and afterwards indict for the offence compounded of them all, and so the plea was held good.

In State *vs.* Lewis (a slave), 2 Hawks, 98, two bills of indictment were found against the prisoner at the same time, one for burglary and larceny, the other for robbery, and both charge the felonious taking of the same goods. On the first the prisoner was convicted of the larceny only. It was ruled that he could not be tried on the second indictment, because it would be twice putting him in jeopardy for the same crime.

In State *vs.* Commissioners of Fayetteville, 2 Murphy, 371, the defendants were tried and convicted for not keeping one of the streets in the town of Fayetteville in repair, and there were three other streets in the same condition, for the neglect to repair which three other separate indictments had been found. The conviction was relied on as a bar to the other indictments and the plea was sustained. "It would be monstrous," says the Court, "to charge them with separate indictments for every street in the town when the whole were out of repair at the same time, especially when upon one indictment a fine can be imposed adequate to the real estimate of the offence." The imputation is of negligence as a distinctive offence, though shown as applicable to different streets, just as an overseer is guilty of but one offence in neglecting to keep his road in repair as a whole and not of as many offences as there are parts of it out of repair and needing amendment

So if a person has been tried for an affray he cannot again be prosecuted for an assault and battery committed in making the affray, State *vs.* Stanly, 4 Jones, 290, and similar ruling was made where the assault was made in a riot and given in

evidence to prove the riot in an indictment for the latter offence.

See also, R. *vs.* Elvington, 9 C. C.
U. S. *vs.* Harrison, 3 Sawyer, 556.
State *vs.* Smith, 44 Vt., 324.
1 Whart. Cr. L., 4th Ed., 565.
Whart. Cr. Ev., 467.

See the elaborate note reviewing all the cases as to the effect of prosecuting for some *integral element* on page 344 of the 58th volume of the American Decisions.

Presenting the case to the State Court, therefore, would, *if the State Court had jurisdiction*, oust the jurisdiction of the Federal Court of the charge of false entry; but as the jurisdiction of the Federal Court of the charge of false entry cannot be ousted, it follows that the State Court has no jurisdiction of the forgery without which there could have been no false entry. The only mode of preserving Federal jurisdiction over the false entry is by denying the State jurisdiction over the question of falsity. If the State Court has conceded to it the function of determining whether or no the entry was false or true, the enforcement of offences against our National Banking system would pass from the Federal to the State Courts, since the Federal Courts would have to bow to the rulings of the State Courts on the question as to whether the alleged inculpatory entry was false or not.

Even as to prosecutions under the Crimes Act, where the jurisdiction *existing* in State Courts is reserved, this rule is applied in all cases in which the offence is one against exclusively national policy.

See State *vs.* Shelly, 11 Lea, Tenn., 594.
State *vs.* Pike, 15 N. H., 83.
United States *vs.* Camerford, 25 Fed. Rep., 902.
37 Legal Intelligencer, 408. See *post.*

A Fortiori is this, the case where the statute creating the offence expressly excludes, as in the present case, State jurisdiction.

It may be said that when there is a Federal and a State aspect of a particular offence, the Federal Court may prosecute for the one aspect, and the State for the other. This, however, only *applies to cases where an acquittal in the one case does not bar prosecution in the other.*

We therefore conclude that, as it has been shown that the defendants made the securities in question, as an official act, under the strain of a supposed necessity of saving the Bank, of which they were President and Cashier, from a ruin which a temporary deposit of these securities, to be taken out as soon as certain expected funds came in, would avert, the State Court has no jurisdiction, the offence being part of a false entry in the books of the Bank, and exclusively within the jurisdiction of the Federal Courts.

We come now to consider the second argument, against the jurisdiction of the State Court over the offence with which plaintiffs in error stand charged.

C.

SECOND PROPOSITION.

Of all offences of which the United States Government has cognizance, the Federal Courts have exclusive jurisdiction. The United States Government has cognizance of the making of the forged note set out in the bill of indictment herein. Therefore the Federal Courts have exclusive jurisdiction to try and to punish the offenders for making said false note. The trial in the State Court was without warrant of law and illegal, and the defendants should be discharged.

The only provisions in the Revised Statutes of the United States relative to the subject of jurisdiction are as follows:

"The Circuit Courts shall have—

"Exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is, or may be, otherwise provided by law, and concurrent

jurisdiction with the District Courts of crimes and offences cognizable therein."—Sec. 629 (subsec. 20), Rev. Stat. U. S.

Again:

"The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned *shall be exclusive* of the Courts of the several States:

"First, of all crimes and offences cognizable under the authority of the United States." Sec. 711 (subsec. 1), Rev. Stat. of U. S.

Then at the beginning of the Crimes Act—Title 70, Ch. I, Sec. 5328—we read:

"Nothing in this text shall be held to *take away* or impair the jurisdiction of the Courts of the several States under the laws thereof."

From whence one would be apt to infer that of all offences denounced in the Crimes Act the State Courts have concurrent jurisdiction with the Circuit and District Courts of the United States.

And if so, it would seem that there is conflict between the above provisions.

We find, however, that in the case, *Ex-parte Haughton*, reported in Myers' Federal Decisions, Vol. 12 (Crimes), p. 421, the sphere of Federal jurisdiction is carefully marked out, and the above Sections 629, 711 and 5328 construed and reconciled. In that case, one Haughton, sentenced by the State Court of Vermont for passing counterfeit national bank bills, applied for his discharge on *habeas corpus, for that*, the State Court had no jurisdiction over the offence and because his imprisonment was contrary to the Constitution and laws of the United States.

The learned Judge, in delivering the opinion of the Court, said: "The National Bank Acts were passed in 1863 and 1864, and provision was made for the punishment of counterfeiting their bills and passing the counterfeits, *but there was no reservation to the State in making these provisions.*" (The provisions are in the Crimes Act).

Without such *reservation*, the States had no power left to them to supplement the acts of Congress by legislation covering the same ground.

Sturges *vs.* Crownshild, 1 Wheat., 122;
Const., Secs. 1937—39;
Prigg *vs.* Penn, 16 Pet., 539.

The Revised Statutes contain a title of "Crimes," in which the provision for punishing counterfeiting national bank bills is placed. It also has this general provision, Sec. 5358: "Nothing in this title shall be held to *take away or impair* the jurisdiction of the several States under the laws thereof."

The provision of the Judiciary Act relating to the criminal jurisdiction of the Circuit Courts is brought into Sec. 629 (subsec. 20) with the qualification of exclusive cognizance changed to "except where it is or may be otherwise provided by law." If these provisions were all, it might be said that Congress had expressly withdrawn the jurisdiction before taken of offences mentioned in the title of "Crimes," so far as the States might choose to exercise similar jurisdiction through their Courts. But chapter 12 of the title on "Judiciary," entitled, "Provisions common to more than one Court or Judge," was placed in the revision and enacted as a part of the Revised Statutes. It commences with Sec. 711, and is as follows:

"The jurisdiction vested in the Courts of the United States in the cases and proceedings heretofore mentioned shall be exclusive of the Courts of the several States."

First, "Of all crimes and offences cognizable under the authority of the United States."

This provision was not in the statutes of the United States anywhere before. It was framed *ex industria* and placed there for some purpose. It is not merely the provision of the Judiciary Act relating to the jurisdiction of the Circuit Court brought forward and placed here as well as in the chapter relating to these courts, to express the same thing in another

connection, but it is a different thing. That provision made the jurisdiction of the Circuit Courts exclusive of all other courts, Federal as well as State, except as otherwise provided. This applies to all the Courts of the United States and *expressly excludes*, and seems to be made to expressly exclude, the jurisdiction of the Courts of the States.

Both provisions are necessary to place the jurisdiction in these cases where it is reposed, among the Federal Courts, and exclude that of the State Courts, and the latter (Sec. 711) would be unnecessary, if *that of the State Courts* was not to be *excluded*.

The language of the section quoted from the title on "Crimes" does not save the jurisdiction of the Courts of the States over the offences made punishable by that title, as section 26 of the Act of 1825 saves it over offences made punishable by that act. It says nothing about offences *as such*, to express or specify its application.

There are many offences made punishable by that title (Crimes Act), some of them such as never could be offences against the laws of any of the States.

The title makes certain offences against the laws of the United States punishable. This section (5328) seems to mean that making them so punishable shall not prevent the States from taking hold of any offences which may be involved that are contrary to the State laws, AND NOT COGNIZABLE UNDER THE UNITED STATES LAWS, and punishing them. And taken in connection with the section making the jurisdiction of the United States Courts over offences *cognizable under authority of the United States wholly*, exclusive of State Courts, it must mean this. Such construction leaves all the sections standing operative, while the other (that is, that Sec. 711 does not apply to any offence in Crimes Act, because of Sec. 5328) would leave the one (Sec. 711) declaring the jurisdiction exclusive inoperative.

The Section 5328 (Crimes Act) is later than the other in the order of the statutes, and might be said to be controlling for that reason; but that ground of inference is expressly removed by the statutes themselves, which provide that no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is plead. Sec. 5600, Rev. Stat. U. S.

The learned Court, applying the foregoing principles to the facts in Haughton's case, say:

"The law of the United States was, and is, that the relator Haughton should be tried by the Court of the United States (notwithstanding his offence falls within the Crimes Act), and not by those of the State, and if guilty, that he should be punished according to the laws of the United States, *and not under those of the States* under which he is in custody."

Again: "Under the provision in the Constitution Congress cannot make the same offence punishable twice. And if Congress cannot do this directly it cannot do it indirectly, by creating an offence, and leave the States to punish it once, and provide by its own laws to punish it again.

"This offence is one over which the State Court had no jurisdiction, and the relator Haughton is restrained of his liberty without warrant of law."

Applying these principles to our case it follows that if the making of the false note set out in the foregoing bill of indictment, by Cross and White, constituted an offence *cognizable under the Federal laws* and punishable by them, then by virtue of Sec. 711 the Federal Courts have *exclusive* jurisdiction of said offence.

By Sec. 5418 it is provided that—

"Every person who falsely makes, alters, forges or counterfeits any bill, guarantee, official bond, public record, affidadit, *or other writing, for the purpose of defrauding the United States*, or utters or publishes as true any such false, forged paper, etc., or other such thing, *for such purpose*, knowing the

same to be false, etc., or transmits or presents at the office of any officer of the United States any such false, forged paper, etc., for such purpose, shall be imprisoned at hard labor for a period of not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment."

In the case at bar it is alleged by the plea in abatement and admitted by the demurrer filed by the Solicitor (every demurrer admits all facts well pleaded—Goul's Pl., ch. II, sec. 43; ch. IX, sec. 21, 1 Stark Cr. Pl., 315) that the defendant Charles E. Cross was President of the State National Bank of Raleigh, N. C., and that Samuel C. White was Cashier of said Bank; that as such President and Cashier respectively the said Cross forged said note, and that the said White assented to the same; that said note was so forged by said Cross and White *for the purpose of deceiving the United States Bank Examiner, and thereby defrauding the Government of the United States.*

These facts being established, it is too plain for further argument that the case of Cross and White falls within the purview of Sec. 5418, *supra*, and if so it is equally clear that the Federal Court would have taken cognizance of said forgery (even in the absence of any entry on the books of the Bank), and if the Federal Court could have taken cognizance of said forgery it is settled beyond all possibility of doubt by the foregoing authorities that by virtue of Section 711 of the Revised Statutes of the United States the jurisdiction of the Federal Court over said forgery is absolutely exclusive of that of the State Court. The language used by the Court in Haughton's case, cited above, applies with equal force to the case of Cross and White. Can it be doubted that by force of Section 5418, *supra*, the Federal Courts can even now take cognizance of the forgery of said note (were it not for the agreement made with the defendants while in Canada)? But shall a man be twice punished for the *same* offence?

It will be contended, no doubt, that Section 5418 of the Rev. Stats. of the U. S. has as its object the protection of the United States Government against forgeries, whereby it is defrauded of money or something of value, and none other.

We think said section does not contemplate and is not intended to cover those cases in which a person has defrauded the United States by obtaining a sum of money thereupon, and if so, it certainly is not *restricted* to that class of cases.

In other words the fraud contemplated by Sec. 5418, *supra*, is not such fraud as results necessarily in a money benefit, or any other kind of benefit to the person committing the same.

That class of cases is expressly provided for by Section 5421 of the Rev. Stats. of the U. S.

If Section 5418 includes that class of cases where the fraud perpetrated must needs be against the United States for the purpose of obtaining a sum of money, then Section 5421 would have been unnecessary.

The frauds that the Act of March the 3d, 1823 (Myers' Federal Decisions, p. 75, U. S. *vs.* Wilcox, 4 Blatch., 385), embraces are all false claims, whether for *land or money.*

What, then, was the necessity for Section 5418? Is it not clear that Section 5418 had as its object the punishment of those frauds committed other than for the purpose of obtaining money?

We are justified in inferring that the words "*for the purpose of defrauding the United States,*" in Section 5418, include, and are used expressly to include, all of those offences committed against the laws of the United States by all acts, omissions, concealments, devices, artifices and conspiracies, which involve a breach of legal duty. See Subject, Fraud—Abbott's Law Dictionary, pp. 520, 521, 522.

We have constructive frauds and actual frauds—frauds against which courts of law will relieve and those against which we have to invoke the aid of a court of equity.

The criminal law finding that in order to constitute an offence, fraud is necessary, pauses not to consider whether it be actual or constructive or fraud of which a court of law or equity will take notice; if it is fraud, it matters not of what kind, it is sufficient.

"Whatever is done in fraud of a law is done in violation of it."

The case of The William King, 2 Wheaton, p. 159.

See also, Lee *vs.* Lee, 8 Peters, 44.

The forgery and entries in the case at bar were done in fraud of Section 5211 of the Rev. Stats. of the United States, which provides that certain reports shall be made to the Comptroller of the Currency, and especially in fraud of Section 5240, which provides for the appointment of Bank Examiners and prescribes their duties. The forgeries and false entries here done were in fraud of Section 5211 and 5240 above, and denounced in Section 5418, and in fraud of Section 5418.

The statute of North Carolina provides that the punishment in such cases shall be "by imprisonment in the county jail or penitentiary for not less than four months nor more than ten years, and by fine, in the discretion of the Court."

The punishment demanded by the Federal statute (Sec. 5418) is "hard labor for a period not more than ten years, or a fine of not more than one thousand dollars, or by both such fine and imprisonment."

Suppose the State Court be conceded jurisdiction, it might render almost nugatory the Federal statute, made for the protection of *its creature*, the State National Bank, by imposing an imprisonment of only four months on all such offenders. The State Court might punish by imprisonment of four or five months, when the United States Government might desire to punish the offence by ten years in the penitentiary and by a fine of one thousand dollars.

Or the Federal Government might decide to impose a fine of $20 and one month's imprisonment, while the State Court

would fine the defendant $5,000 and put him in State's prison for ten years.

To concede the State jurisdiction over such cases would be to paralyze to that extent the arm of the General Government, render it unable to protect itself, and place it completely within the control and subject to the Courts of the several States.

It may be said that the plea in abatement herein does not allege that the notes were forged for the purpose of defrauding the United States. The plea does allege that the notes and entries were made for the purpose of *deceiving* the duly appointed agent of the United States, to-wit: The Bank Examiner. If the argument above in regard to the kind of fraud required by Section 5418 is correct, it surely cannot be doubted that to forge a note for the purpose of deceiving a duly appointed agent of the United States is an act in fraud of the Government, and within the provision of Section 5418.

D.

THE QUESTION OF JURISDICTION ASIDE FROM THE PLEA IN ABATEMENT.

Aside from the plea in abatement and the demurrer thereto it appears on the 25th page of the Record herein that the learned Solicitor introduced the Bank journal in evidence and proved that the notes set out in the bill of indictment herein were entered upon the said journal of said Bank by Samuel C. White.

On page 20 of said Record, page 45 of the Brief filed herein, exception No. 27, the defendants asked the Court to charge the jury to "disregard all the evidence, etc., because admitting said evidence, it did not prove a case of which the Court had jurisdiction.

The defendant White leaving the plea in abatement out of the question, was entitled to this instruction; and as the So-

licitor put the plea in abatement in evidence, the defendant Cross was also entitled to said instruction, since the question of jurisdiction can be raised at any stage of the trial.

We will now briefly review some of the cases touching the subject of State and Federal jurisdiction in support of both of the foregoing propositions.

E.

ANALOGOUS ADJUDGED CASES.

In the case of Delafield *vs.* The State of Illinois, 2 Hill's Reports, 169, the Supreme Court of New York say:

"Crimes are only punished by the *Government against which they are committed*, and the State Courts will not enforce the penal laws of the United States, or of any other State. This rests on a general principle, wholly independent of the Federal Constitution." (The United States *vs.* Lathrop, 17 Johns' R., 4; Story on the Conflict of Laws, 516, 2d Ed., and cases cited).

"There are some cases where Congress has declared the jurisdiction of the Federal Courts *exclusive*. *But they are* cases which are *peculiar to and spring out of the very existence of the Federal Government*," (as in our case there could have been no notes made for the purpose of deceiving the Bank Examiner and thereby defrauding the Government, unless the National Banking system had been created by act of Congress), "and not cases of which the State Courts had cognizance prior to the adoption of the Constitution. A distinction of this kind was taken by Mr. Hamilton in the 82d number of the *Federalist*, and has been recognized since that time (Martin *vs.* Hunter's Lessee, 1 Wheat., 334—7; 1 Kent, 395, 4th Ed.), and see Cohen *vs.* Virginia (6 Wheat, 418), where Chief Justice Marshall tells us that the *Federalist* is a work of great authority and cites a part of the number to which I have referred."

In the case of People *vs.* Lynch, 11 Johns, 549, the defendants, who were brought up on *habeas corpus*, were indicted at the General Sessions of the Peace, in the City of New York, for treason against the State (the Crime of treason is included in the Crimes Act), the Court said:

"We think the jurisdiction of the State Courts does not extend to the offence of treason against the United States.

"The *judicial power of the United States* EXTENDS TO ALL CASES *arising under the Constitution and laws of the United States.*

"The act establishing the judicial courts of the United States gives to the Circuit Courts cognizance, *exclusive*, of the courts of the several States, of all crimes and offences *cognizable* under the authority of the United States, except where the laws of the United States shall otherwise direct. The present indictment cannot be supported. The prisoners must, accordingly, be discharged."

In the case of Martin *vs.* Hunter's Lessee, opinion by Story, Judge, 1 Wheaton, 346, we read the following:

"The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies and State interests might sometimes obstruct or control the regular administration of justice * * *"

In respect to the other enumerated cases—cases *arising under the Constitution*, *laws* and treaties of the United States, reasons of a higher and more extensive nature, touching the safety, peace and sovereignty of the nation, might well justify a grant of exclusive jurisdiction. (Examine carefully the great case of United States *vs.* Lathrop, 17 Johns, p. 4, especially star page 18).

"It is said to be a fundamental maxim that the courts of one sovereign will not take cognizance of, or enforce the penal laws of another sovereign; but I think it more correct to say that, 'one *sovereign* OUGHT NOT *to* ENTRUST THE EXECUTION OF ITS PENAL LAWS TO THE COURTS OF ANOTHER SOVEREIGN';

and as applicable to sovereigns of distinct and separate territorial jurisdictions there is obvious reason and wisdom in the policy of such usage."

United States *vs.* Lathrop, 17 Johns, star page 22.

In the case of the State *vs.* Pike, 15 N. H., 83, the defendant was indicted for forgery alleged to have been committed before a commissioner in bankruptcy duly appointed by the District Court of the United States for the District of New Hampshire. The defendant filed a general demurrer. C. Flanders, for defendant, said:

"There is another jurisdiction here paramount to that of the State. The 4th section of the Bankrupt Act provides for an examination of the bankrupt, and that if he swear falsely he shall be deemed guilty of forgery. (Crimes Act, Section 5392). The District Court has exclusive jurisdiction. No jurisdiction is given to the State Courts by this act. By the revised statutes of this State the punishment for forgery is different from that prescribed by the laws of the United States. Our statute applies to our own local jurisprudence."

Parker, C. J., in delivering the opinion of the Court, said:

"It is clear that we have no jurisdiction of an indictment for perjury under the statutes of the United States. *Regarded as an offence against the United States*, the courts of the General Government have *exclusive jurisdiction*."

The matters from which the charge now before us *arises are alleged to have occurred under, and in the course of the execution of the laws of the United States. These laws required certain things to be done. Congress had the right to prescribe how they should be done*, to regulate the duties of all persons who *acted under the law, and to prescribe penalties* for the violation of such duties. In such case if acts are done which, if transacted under the laws of this State, would be construed offences within the provision of our Criminal Code, yet, being done in pursuance (in violation) of the laws of another government, the acts cannot be regarded as having been

done under the sanction (in violation) of the laws of this State, so as to subject the parties to punishment under these laws.

In the case of State *vs.* Shelly (Tenn., 564), which was an indictment in the State Court for perjury, committed before a United States Commissioner, the Court said:

"The well understood line of right and duty on the part of every government, in reference to the question here presented (jurisdiction), is, that every government claims and exercises jurisdiction to control and *protect from intrusion or injury the public justice as administered in its own courts, and the purity of administration of its own laws.* THIS IS ESSENTIAL TO THE INDEPENDENCE AND EFFICIENCY of any and every sovereignty—a right that could not be surrendered. The principle we have announced is distinctly recognized by the Supreme Court of the United States in the case of the United States against Bailey, 9 Peters' R., 341 (Cush. ed.); Brown *vs.* U. S., 14 Am. Law Reg., cited in State *vs.* Shelly, 11 Lad., 594; Ross *vs.* State, 55 Ga., 192, 2 Bish. Cr. Law, sec. 1023."

"The jurisdiction of a Federal Court depends upon three things: First, *the nature* of the offence; second, the *status* or nationality of the party committing it; and third, the *place* where it was committed. This is so because the criminal jurisdiction of the Courts of the United States is limited." *Ex-parte* Reynolds, 5 Dill., 395.

"Section 711 of the Revised Statutes of the United States enacts that the jurisdiction vested in the Courts of the United States over *crimes* and *offences cognizable* under the laws of the United States shall be exclusive of that of the State Courts. Therefore, where a State Court arrested one on the charge of murder, and the killing was done in a *navy yard* in which criminal jurisdiction had been ceded by the State, the District Court released the prisoner on a writ of *habeas corpus.*" *Ex-parte* Tatem, 1 Hughes, 598.

In Tatem's case, *supra*, jurisdiction was denied the State Court because of the *place* in which the offence was committed. In our case we claim that the State Court has no jurisdiction because of the *nature* of the forgery, and provided for as it is by Section 5418 of the Revised Statutes of the United States.

"On a petition for a writ of *habeas corpus* it appeared that the petitioner had been tried in the State Court of Georgia, and convicted of committing perjury before a United States Commissioner, and confined in the penitentiary. Held, that the State Court had no jurisdiction of the offence of perjury committed in the Federal tribunals."

Ex-parte Bridges, 2 Curt., L. J., 327.

Cited in Myers' Fed. Doc., Vol. 12, S. 1705.

(The perjury above named, and of which it was held that the State Court of Georgia had no jurisdiction, is denounced in the "Crimes Act," Sec. 5392; the making the forged note in our case is denounced also in Crimes Act, Sec. 5418; why should not the same principle, as to jurisdiction, apply to Section 5418 that applies to Section 5392?)

As to the construction of the words "other writing," contained in Section 5418 of the Revised Statutes of the United States, see the case of the United States *vs.* Lawrence, 13 Blatchford, 211, cited in Myers' Fed. Doc., Vol. 12, Sec. 321; also U. S. *vs.* Bickford, 4 Blatch., 337, cited in Myers' Fed. Doc., Vol. 12, S. 310, where it is said that the words "other writing" in said Section 5418 include an oath required to be taken before the entry of goods at a custom-house; also on importers' entry and an importer's bond.

(The words "other writing" will *then* certainly include a promissory note made for the purpose of defrauding the Government).

The United States and the several States are distinct sovereignties, *each having its own system of criminal law, which it administers in its own tribunals;* and the criminal laws of a State can in no way affect those of the United States. Charge to the Grand Jury. 2 Curt., 637.

Section 5418 of the Revised Statutes of the United States requires that the note set out in the bill of indictment against Cross and White should have been forged "for the purpose of defrauding the United States." Aside from the fact that the Solicitor's demurrer admits that such was the intent of the defendants, as they alleged in their plea, it must be remembered that said note was entered on the books of said bank for the purpose of deceiving the United States Bank Examiner, as is also alleged and admitted. Such being the facts, we find that "an *intent* to defraud a bank and deceive its officers will be *inferred* from embezzlement of its funds and *false entries* in its books."

In re Coppen, 2 Ben., 419.
Myers' Fed. Doc., Vol. 12, Sec. 1421.

(On a prosecution by the United States Government under Section 5418, for making said forged note, the fact of entry of said note on the books of said Bank might be put in evidence as showing the intent with which said note was made). Section 5418 of the Rev. Stat. of the United States, under the case of the United States *vs.* Lawrence, 13 Blatch., 211, *supra*, includes under the words "other writing" the offence of making a false entry, committed by defendants, in entering the forged note in this case on the books of said Bank.

To concede the State jurisdiction to try the said forgery would, under the reasoning and authorities contained in my first proposition, nullify two distinct Federal statutes; not only Section 5209, but also Section 5418.

In 1830 the State of South Carolina *resolved* that "All laws of the United States laying duties are absolutely null and void," and threatened to resist any further payment of such duties. This threat to attempt to nullify the laws of the Federal Government in regard to the tariff brought about a great debate between Mr. Hayne and Mr. Webster. While the present case may, perhaps, sink into insignificance compared with the consequences then involved, yet the *principle*

here is exactly the same. If the State Court takes jurisdiction of the case at bar it will nullify two distinct Federal statutes.

If the State may nullify two Federal statutes she may nullify all, and render inoperative within her borders every provision in the Revised Statutes of the United States, if she may likewise do so by legislative enactment. And what is that?

The remarks of Mr. Webster on the subject of Nullification in 1830, and afterwards in 1833, when the South Carolina Ordinance had been passed; and also the principles enunciated by President Jackson in his Proclamation of 1832 and in his Nullification Message of 1833, will throw much light on the proper determination of the case if *considered in their true scope, intent and meaning.*

"The people then, sir, erected this Government. They gave it a Constitution, and in that Constitution they have enumerated the powers which they bestow on it. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of such powers as are granted; and all others, they declare, are reserved to the States or the people. But sir, they have not stopped here. If they had, they would have accomplished but half their work. No definition can be so clear as to avoid possibility of doubt; no limitation so precise as to exclude all uncertainty. Who, then, shall construe this grant of the people? Who shall interpret their will, where it may be supposed they have left it doubtful? With whom do they repose this ultimate right of deciding on the powers of the government? Sir, they have settled all this in the fullest manner. They have left it with the government itself, in its appropriate branches. Sir, the very chief end, the main design, for which the whole Constitution was framed and adopted, was to establish a government that should not be *obliged to act through State agency*, or *depend* on *State opinion* and *State discretion*. The people had

had quite enough of that kind of government under the Confederation. Under that system the legal action, the application of law to individuals, belonged exclusively to the States. Congress could only recommend; their acts were not of binding force till the States had adopted and sanctioned them. Are we in that condition still? Are we yet at the *mercy* of *State discretion* and *State construction?* Sir, if we are, then vain will be our attempt to maintain the Constitution under which we sit.

"But, sir, the people have wisely provided, in the Constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law. There are in the Constitution grants of powers to Congress and restrictions on these powers. There are, also, prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions and prohibitions. The Constitution has itself pointed out, ordained and established that authority. How has it accomplished this great and essential end? By declaring, sir, that '*the Constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.*'

"This, sir, was the first great step. By this the supremacy of the Constitution and laws of the United States is declared. The people so will it. *No State law is to be valid which comes in conflict with the Constitution, or any law of the United States passed in pursuance of it.* But who shall decide this question of interference? To whom lies the last appeal? This, sir, the Constitution itself decides also by declaring that '*the judicial power shall extend to all cases arising under the Constitution and laws of the United States.*' These two provisions cover the whole ground. They are, in truth, the key-stone of the arch! With these it is a government; without them it is a confederation.

"And now, Mr. President, let me run the honorable gentleman's doctrine a little into its practical application. Let us look at his probable *modus operandi*.

"I wish to be informed *how* this State interference is to be put in practice without violence, bloodshed and rebellion. We will take the existing case of the tariff.

"South Carolina is said to have made up her opinion about it. If we do not repeal it (as we probably shall not), she will then apply to the case the remedy of her doctrine. She will, we must suppose, pass a law of her Legislature declaring the several acts of Congress, usually called the tariff laws, null and void, so far as they respect South Carolina, or the citizens thereof. But the collector at Charleston is collecting the duties imposed by the tariff laws. He, therefore, must be stopped. The collector will seize the goods if the tariff duties are not paid. The State authorities will undertake their rescue, the marshal, with his *posse*, will come to the collector's aid, and here the contest begins. The militia of the State will be called out to sustain the nullifying act."

(It is not difficult to apply this reasoning to the case in hand).

"The people have preserved this, their own chosen Constitution, for forty years, and have seen their happiness, prosperity and renown grow with its growth, and strengthen with its strength. They are now, generally, strongly attached to it. Overthrown by direct assault, it cannot be; evaded, undermined, NULLIFIED, it will not be, if we, and those who succeed us here, as agents and representatives of the people, shall conscientiously and vigilantly discharge the two great branches of our public trust, faithfully to preserve, and wisely to administer it.

"It strikes a deadly blow at the vital principle of the whole Union. To allow State resistance to the laws of Congress to be rightful and proper, to admit nullification in some States, and yet not expect to see a dismemberment of the entire

government, appears to me the wildest illusion, and the most extravagant folly. The gentleman seems not conscious of the direction or the rapidity of his own course. The current of his opinions sweeps him along, he knows not whither. To begin with nullification, with the avowed intent, nevertheless, not to proceed to secession, dismemberment and general revolution, is as if one were to take the plunge of Niagara, and cry out that he would stop half way down. In the one case, as in the other, the rash adventurer must go to the bottom of the dark abyss below, were it not that that abyss has no discovered bottom.

"Nullification, if successful, arrests the power of the law, absolves citizens from their duty, subverts the foundation both of protection and obedience, dispenses with oaths of allegiance, *and elevates another authority to supreme command.* Is not this revolution? And it raises to supreme command four-and-twenty distinct powers, each professing to be under a general government, and yet each setting its laws at defiance at pleasure. Is not this anarchy, as well as revolution? Sir, the Constitution of the United States was received as a whole, and for the whole country. If it cannot stand altogether, it cannot stand in parts; and if the laws cannot be executed everywhere, they cannot long be executed anywhere.

"I consider, then, the power to annul a law of the United States, assumed by one State, *incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it is founded, and destructive of the great object for which it was formed.*"

CONCLUSION OF THE ARGUMENT ON THE QUESTION OF JURISDICTION.

It appears from the foregoing arguments, principles and authorities that the State Court has no jurisdiction over the case of Cross and White. That their offence culminated with the making the false entries of the notes on the books of the Bank. That of all false entries on said books the Federal Court has exclusive jurisdiction. That to concede the State jurisdiction of the forgery would be to bar the Federal Court of the false entry. That as that cannot be done, it follows that the State Court has no jurisdiction of the forgery.

It appears further, that of all offences cognizable by the Federal Courts the Federal Courts have exclusive jurisdiction.

It appears that the offence of making said notes was, and is, cognizable by the Federal Courts. Therefore the State Court has no jurisdiction.

It appears that to concede the State Court jurisdiction over the offence at bar would be, in the teeth of all the analogous adjudged cases, contrary to the spirit and intent of the Federal Constitution, and productive of clash and conflict between the State and General Government.

I conclude respectfully that the argument against the State's jurisdiction over the case at bar is absolutely irresistible, and cannot be answered in the light of the Constitution.

II. JURY—VERDICT—HOW OBTAINED.

SECOND ASSIGNMENT OF ERROR.

Through the officer appointed a communication was sent to the Court, the same being as follows:

"*To His Honor, Judge Avery:*

"It is *impossible* for us, the jury, to agree upon a verdict, and I respectfully ask your Honor to relieve us. I have

been suffering for a day or more with sick headache, caused by indigestion, and do not feel able to continue longer.

"Respectfully, &c., W. T. HODGE.

"July 21, 1888."

The Court ordered that the jury be brought into open court. When the jury was brought into court the Judge, in the exercise of his discretion, in presence of the defendants, *polled* the jury. The defendants objected to the polling of the jury and excepted to the right claimed by the Court to poll the jury.

In polling the jury the Court first asked the jury, as a body, whether they could agree, and the foreman replied that *they could not.*

The Judge then asked each juror, as the Clerk called his name: "What say you, are the defendants or either of them guilty, in manner and form as charged in the bill of indictment, or not guilty?" The manner of polling the jury is also excepted to by the defendants. When the jury was polled in the presence of the prisoners it appeared that all the jurors had agreed that both of the defendants were guilty as to the first two counts in the bill (one for forgery, the other for uttering, with allegation of *general intent*), but two of the jurors said that they were "not guilty" as to the third and fourth counts of the bill of indictment (one for forgery with intent to defraud the State National Bank, the other for conspiracy with allegation of general intent).

Thereupon the Solicitor proposed in the presence of the jury to enter a "*nolle prosequi*" as to the third and fourth counts in the bill of indictment. Counsel for defendants objected. The jury were sent out. Defendants' counsel addressed the Court for some time.

The jury are thereupon brought into court and informed by the Court that the Solicitor had entered a "*nolle prosequi*" as to the third and fourth counts in the bill of indictment,

and they have only to pass upon the guilt or innocence of each of the defendants as to the first and second counts of the bill of indictment. The defendants excepted, and thereupon the Solicitor, in open court, in the presence of defendants, says he will not further prosecute in the third and fourth counts of the bill of indictment. The defendants excepted again.

The jury retired in charge of the sworn officer, and thereupon the said jury come into court and for their verdict say that the defendants are guilty in manner and form as charged in the bill of indictment.

And thereupon T. C. Fuller, Esq., of counsel for defendants, moved the Court that the jury be polled, and the said jury, being called each by name and asked by the Court, "What say you, are the defendants or either of them guilty, in manner and form as charged in the bill of indictment, or 'not guilty'?" And the said jury, each for himself, say "guilty."

And thereupon the defendants offer an exception in form as follows:

"For that, under the circumstances in the record herein stated, the verdict ought not to be accepted by the Court and recorded as the verdict of the jury."

The jury were then discharged after entering their verdict in the presence of the prisoners.

The exceptions of the defendants are entered as explained by the foregoing statement.

ARGUMENT.

The defendants, it will be seen, excepted first, to the right of the Court to poll the jury.

I have looked in vain for authority sustaining the learned Judge in thus polling the jury. It seems that not only has such a method of procedure never obtained, but that no one ever contemplated its existence.

The defendants say that for His Honor to poll the jury as he did was without warrant of law, that they were greatly hurt thereby, and that to concede to our Judges such a right would be to destroy forever the value of trial by jury, and that the grandeur and glory of the system would soon pass into history. The old common law rule of letting the jury have nothing but bread and water, and of carrying them from county to county in carts until they agreed upon their verdict, has long since been repudiated by the progress, the wisdom and justice of the age in which we live. But we have advanced but little, if at all, if we are to have a new system inaugurated which is to make the individuals composing a jury make known, *before they have agreed upon their verdict*, their individual *status*, so that the Krupp gun of public opinion, and all other influences that may be felt necessary, may strike the bull's-eye in the jury box, that is to say, the juror or jurors hanging the jury.

Such a principle and our jury system cannot live together.

It may be contended that in the case at bar the defendants were not hurt by the action of the Judge in polling the jury, because it was found that the jury had agreed upon the first two counts, and the Solicitor entered *nolle prosequi* as to the other counts. We *were* hurt.

The jury having been *impaneled*, defendants were in jeopardy. We were entitled to a verdict of not guilty, or a mistrial, if we could get it. The law of North Carolina is that a *nolle prosequi* shall not bar second prosecution. Either that principle does not apply to cases like this, or, if it does, is not good law, or the *nolle prosequi* entered by the Solicitor here was illegal, for they both have to bow to the Constitution, and under its provision they cannot stand together. There were four counts in the bill of indictment. Upon the third and fourth counts the jury was undecided in favor of the defendants; after this fact had been discovered by POLLING them, had the Solicitor any right to enter a *nolle prosequi*

as to said counts and thus force a verdict? I conclude that he had no such right from a review of the following authorities:

"When a criminal case is put to a jury it cannot be withdrawn except by *consent of the accused*, or because of some unavoidable accident."

State *vs.* McKee, 21 Am. Dec., 502.
State *vs.* Thornton, 13 Ired., 256.
State *vs.* Taylor, 84 N. C., 773.
State *vs.* Hornsby, 41 Am. Dec., 320.
Wharton on Cr. L. Principles, Pl. & Ev., Sec. 513.

The Supreme Court of North Carolina, in its opinion delivered in this case, say:

"The Solicitor had no right to enter a *nolle prosequi* in its strict legal sense, which, like a nonsuit in a civil action, would leave the defendants exposed to another prosecution for the same offence. The action of the Solicitor is miscalled, but in legal effect it was a consent to an acquittal of the accusations in the specified counts, and such is the result of a failure to render a verdict upon some of several counts in an indictment."

State *vs.* Taylor, 84 N. C., 773.
State *vs.* McNeill, 93 N. C., 552.
State *vs.* Bower, 94 N. C., 910.
State *vs.* Thompson, 95 N. C., 596.

The Court say "the Solicitor had no right to enter a *nolle prosequi* in its strict legal sense." Then if the Supreme Court of the United States should find that the action of the Solicitor was not "miscalled," but was a *nolle prosequi* in every sense, then it will also find that such was not "due process of law under the 14th Amendment to the Constitution of the United States and according to the very language of the Supreme Court of North Carolina." But it is said by the learned Court, after declaring that "the Solicitor could not legally enter a *nolle prosequi* under the circumstances, that the action

of the Solicitor was '*miscalled*,' it was merely a consent to an acquittal on the other two counts." Now, the trial Judge called it a *nolle prosequi*, the Solicitor termed it and meant it as a *nolle prosequi*, the jury was instructed by the trial Judge that it was a *nolle prosequi*, the jury acted upon the instruction that it was a *nolle prosequi*, the plaintiffs acted upon the judicial and solicitorial declaration that it was a *nolle prosequi*, it was entered upon the record and stands there now as a *nolle prosequi*, that record cannot now be amended, and plaintiffs in error only have these rights which they would have under a *nolle prosequi*.

If this did not constitute a *nolle prosequi*, what can?

"The words 'due process of law' were undoubtedly intended," said the Supreme Court of the United States in Murray's Lessees *vs.* Hoboken, 18 How., 272, etc., "to convey the same meaning as the words by 'the law of the land' in *Magna Charta*." That the one is the equivalent of the other was recognized in Davidson *vs.* New Orleans, 96 U. S., 97. Whether the phrase in our American Constitutions, National or State, be "law of the land," or "due process of law," it means in every case the same thing.

Cooley's Const. Lim., 352.

To what principles must we look to ascertain whether a certain method of procedure is "due process of law" in the meaning of the Constitution?

"We must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.*"

Murray's Lessees *vs.* Hoboken, etc., 18 How., 272, 276–7.

Magna Charta—upon which rested the rights, liberties and immunities of our masters, was called, said Coke, "the Charter of the Liberties of the Kingdom, upon great reason, because *liberos facit*, it makes the people free." Hallam characterizes

the signing of it as the most important event in English history, and declares that the instrument is the key-stone of English Liberty. "To have produced it," said Mackintosh, "to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind." By that instrument it was declared "no freeman shall be taken or imprisoned, or be disseized of his freehold or liberties, etc., nor will we pass upon him, nor condemn him but by *lawful* judgment of his peers or by the law of the land."

We can find at common law, indeed, nowhere in the civilized world, where the institution of trial by jury is known, any such "settled usages and mode of proceeding" in jury trials as was adopted by the learned Judge below and sustained by the State Supreme Court.

After *Magna Charta*—which became part of the common law in America—if a man had committed murder in the face of every court in England he could not have been tried but by a jury. The 14th Amendment was intended to guarantee to every citizen of the States a continuance of this immunity and protection, and when tried by a jury it must be according to "settled usage and mode of proceeding." When in the history of North Carolina or the Union did it become the "settled usage and mode of proceeding" in jury trials to poll the jury before they announce that they are agreed, and in the teeth of the declaration by their foreman that they have not and cannot agree?

Says Justice Harlan, in the case of Hurtado *v.* California, 110 U. S., 549: "It is difficult in my opininion to overestimate the value of the petit jury system in this country." Says he, "A sagacious statesman and jurist has well said that it was the best guard of both public and private liberty which has hitherto been devised by the ingenuity of man," and that "liberty can never be insecure in that country in which the trial of all crimes is by jury." "When our more immediate ancestors," says Story, "removed to America they brought

this privilege with them as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."

Story's Const., 1779.

The method of procedure adopted in the case at bar to obtain a verdict from the petit jury, if it is to be sustained, will ere long wreck the jury system.

The plaintiffs in error, without citing further authorities, beg to say that they rely on this point principally upon the powerful opinion of Justice Harlan in the case of Hurtado *v.* The State of California, 110 U. S., 538. They invoke its genius, spirit and letter in this behalf.

CONCLUSION.

Plaintiffs in error respectfully claim that the courts of the State of North Carolina, both Superior and Supreme:

I. In assuming jurisdiction of the offence with which they stand charged herein, deprived them of their rights, privileges and immunities under the Constitution of the United States and of North Carolina, and the laws made in pursuance thereof, and especially Sections 5209 and 5418 of the Rev. Stats. of the United States.

II. In polling the jury as stated above, denied and deprived them of their rights, privileges and immunities under Art. 14, Clause 1, Amendment to the Constitution of the United States, and of Constitution of North Carolina;

That they were deprived of their liberty without "due process of law," and that they were denied the privileges and immunities of trial by an impartial jury in the meaning of the Constitution.

Wherefore in as much as it manifestly appears from the record in said cause and the foregoing assignment of error therein, that in the proceedings in said cause had in said Supreme Court of North Carolina the decision of said

Supreme Court of North Carolina was adverse to and in denial of the several claims made and interposed by plaintiffs in error respectively, and the final order and judgment of said Court in terms deprives plaintiffs in error of their liberty respectively, in disregard of the rights, privileges and immunities advanced, set up and claimed by plaintiffs in error respectively, under the Constitution of the United States, the amendments thereto and the laws made in pursuance thereof, and denies to plaintiffs in error rights, privileges and immunities guaranteed and secured to them respectively under said Federal Constitution and amendments and laws;

Whereby great wrong, injury and damage have come to plaintiffs in error, Charles E. Cross and Samuel C. White, respectively, &c.;

Therefore they pray for the reversal of the judgment of said Supreme Court of the State of North Carolina.

W. R. HENRY,

Of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

No. 1084.

CHARLES E. CROSS AND SAMUEL C. WHITE, PLAINTIFFS IN ERROR.

vs.

THE STATE OF NORTH CAROLINA.

Motion for Certiorari.

The plaintiffs come into Court now here, by W. R. Henry, their attorney, and allege that the transcript of record sent up from the supreme court of North Carolina is materially defective, in that—

I.

It nowhere appears upon said transcript that the grand jury brought the bill of indictment in said case into open court.

II.

It nowhere appears upon said transcript upon what day the judgment of the lower court, as affirmed by the supreme court of North Carolina, is to begin, which is necessary under the law of North Carolina as well as in other States of the Union.

III.

The certificate annexed to the judgment of the supreme court of North Carolina (Transcript, 27), the certificate to the opinion of the supreme court of North Carolina (Transcript, 39), the certificate to the bond required by this court (Transcript, 42), and the certificates to the various exhibits in this case (Transcript, 25–26) are as your affiant believes, insufficient, not in accordance with law, and do not appear, as they ought to appear, upon the record below.

IV.

The Plea to the jurisdiction of the state court (which is the principal point in the case) is defectively and improperly set out in the Transcript in that it fails to allege as the record below does allege, that the fogery here charged was committed for the purpose of making and sustaining a false entry in the Books of said National Bank—which omission is material to the case of the plaintiffs.

Wherefore plaintiffs in error respectfully pray this honorable Court that its writ of certiorari may issue to the supreme court of North Carolina, requiring the clerk thereof to send up a perfect transcript of the record herein, and to do all other things herein that may be necessary, &c.

Respectfully submitted,

W. R. HENRY,

Attorney for Plantiffs in Error.

Office Supreme Court U. S.
FILED.
MAR 20 1889
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE U. S.

SPRING TERM, 1889.

No. 1493.

CHARLES E. CROSS, AND SAMUEL C. WHITE, *vs.* THE STATS OF NORTH CAROLINA.

Brief and Argument against advancement of said case.

Plaintiffs in Error, respectfully show this Honorabe Court, in reply to the motion made by the Attorney General to advance the above-named case:

I. That said motion is insufficient and illegal in form, in that, the statement of facts contained therein is entirely too meagre, and does not comply with the rule of law enunciated in the case of Call *v.* Palmer—106, U. S., 39, where it is said, motions to advance should be accompained by an *agreed* statement of the case, or by such *extracts from the record* as will show that the case is one to which the rule is applicable; nothing of the kind appears in the Attorney General's Motion; see also the case of United States *v.* Norton, 91 U. S. 558. In that case, the Court after declaring that the facts must be stated in the motion so that the Court may be able to grasp the case, say further, "In the present crowded state ot the docket, it is our duty to see that cases are not *unnecessarily* brought forward to the prejudice of others."

II. That granting the motion to be in due form, yet it does not present a case, which is entitled to advancement. For that said case is not a case of "great public interest," or any *public interest* beyond that of many cases on the criminal dockets in the Courts of North Carolina.

That through there are other indictments, against plaintiffs they do not affect the case here, nor does this affect them. It is sufficient answer to the motion to advance, that this is not a case of *public interest* as will appear from an inspection of the transcript, and would appear from the motion to advance, were it in legal form.

The court in passing upon the motion of the Attorney General to advance this case, will remember that Chief Justice Waite in the case of Carter V. Greenhow, 109. U. S. 64, said:

"A case will not be taken up out of its order simply because it is of great public importance." (Here, we say it is not of great public importance.) Proceeding, the court say in that case:

"The questions involved may be of public importance, but that does not neccessarily entitle the parties to a hearing in prefrence to others. Practially, every case advanced postpones another, that has been on the docket three years awaiting its turn in the regular call. Under these circumstances we deem it our duty not to take up a case out of its order except for *imperative* reasons."

We respectfully submit that there are no *imperatative reasons* why this case should be advanced. The Court will also see, from the case of Louisiana *v.* New Orleans, 103, U.

S. 521, that it is there declared: "That a case not entitled to precedence will not be advanced over the objection of the opposite party."

Whereupon Plaintiffs in Error, pray that this case be not advanced, but take its regular place on the docket.

Respectfully,

W. R. HENRY,
Attorney for Plaintiffs.

No. 1493.

In the Supreme Court of United States,

SPRING TERM, 1889.

CHARLES E. CROSS AND SAMUEL C. WHITE,
Plaintiffs in Error,
vs.
THE STATE OF NORTH CAROLINA.

Assignment of Errors.

And now come Charles E. Cross and Samuel C. White, jointly and severally, by W. R. Henry, their attorney, and complain that in the record and proceedings, and also in the rendition of the final judgment in a suit wherein said Cross and White were appellants to the Supreme Court of North Carolina, being the highest court of said State in which a decision could be had in said suit, and in which a final judgment was rendered against them on November 5th, A. D. 1888, certain Federal questions were presented, claimed and determined in said court and cause and the proceedings therein and the decision thereof was adverse to and against the right, privilege, immunity and claim of plaintiffs, in the determination of which there was manifest error.

Section 709 of the Revised Statutes of the United States (page 133, second edition) provides as follows, to-wit:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or authority exercised under the United States,

and the decision is against the validity; or where is drawn in question the validity of a statute of an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privileges or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined, and reversed or affirmed in the Supreme Court upon writ of error.

"The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

The transcript of the record in this case shows that,

I. There was an authority exercised by the Superior Court of the county of Wake, in the State of North Carolina, under the State, which was claimed by plaintiffs to be repugnant to the Constitution and laws of the United States, and that the decision, both of the Superior and Supreme Courts, was in favor of the validity of the authority so exercised. (Record 1-9).

II. Said transcript further shows that a right, privilege and immunity was claimed under the Constitution of the United States and the decision of the State Courts was against the claim. (Record 1-9).

III. Said transcript further shows that the State Court herein so construed the State law, Section 1029 of The Code of North Carolina, on the subject of forgery, as to make its operation in the case at bar unconstitutional. (Record 1-9).

IV. Said transcript further shows that the trial judge

in polling the jury, as will more fully appear later on, violated the provisions of the 14th Amendment to the Constitution of the United States. (Record 1-9).

Section 1029 of The Code of North Carolina, Volume I, is as follows:

"If any person of his own head and imagination or by false conspiracy or fraud with others shall wittingly and falsely forge and make, or shall show forth in evidence, knowing the same to be forged, any * * *, promissory note * * * with intent in any of said instances to defraud any person or corporation, and shall be duly convicted, the person so offending shall be punished by imprisonment in the penitentiary, etc."

By Section 5209 of the Revised Statutes of the United States it is provided that

"Every President, Director and Cashier * * * of any (banking) association who makes any false entry in any book, report or statement of the association with the intent to injure or defraud the association or any other company, body politic or corporate or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and any person who, with like intent, aids or abets any officer * * * in any violation of this section shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

The Federal Courts have exclusive jurisdiction of all such false entries as are denounced in the above section of the Revised Statutes of the United States, by virtue of Section 711 of said Revised Statutes.

By Section 5418 and 5479 of the Revised Statutes of the United States the forgery of "bonds, bids, guarantees, securities or *other writings*, for the purpose of defrauding the United States, is denounced, and said offences so de-

nounced are also within the exclusive jurisdiction of the Federal Courts by virtue of said Section 711, *supra*.

Plaintiffs in error respectfully claim that the courts of the State of North Carolina, both Superior and Supreme:

I In assuming jurisdiction of the offence with which they stand charged herein, deprived them of their rights, privileges and immunities under the Constitution of the United States and of North Carolina, and the laws made in pursuance thereof and especially Sections 5209 and 5418 of the Revised Statutes of the United States, for that; one of them, at the time of the forgery set forth in the indictment, was President, and the other Cashier, of the State National Bank at Raleigh, North Carolina, and the notes alleged to be forged were made by the plaintiffs, not for their own benefit, but to sustain certain false entries made by them in the Bank, the object of which was to enable it to stand the test of a then impending official examination, and to give it time to collect its assets so as to be saved from insolvency, the forgery being an integral and essential element in the false entry of which the Federal Court has exclusive jurisdiction.

II. In polling the jury as stated in the denied and deprived them of their rights, privileges and immunities under Art. 14, Clause 1, Amendment to the Constitution of the United States, and of the Constitution of North Carolina; (Record 7-9).

That they were deprived of their liberty without "due process of law," and that they were denied the privileges and immunities of trial by an impartial jury in the meaning of the Constitution.

Wherefore in as much as it manifestly appears from the record in said cause and the foregoing argument of error therein, that in the proceedings in said cause had in said Supreme Court of North Carolina the decision of said

Supreme Court of North Carolina was adverse to and in denial of the several claims made and interposed by plaintiffs in error respectively, and the final order and judgment of said Court in terms deprives plaintiffs in error of their liberty respectively, in disregard of the rights, privileges and immunities advanced, set up and claimed by plaintiffs in error respectively, under the Constitution of the United States, the amendments thereto and the laws made in pursuance thereof, and denies to plaintiffs in error rights, privileges and immunities guaranteed and secured to them respectively under said Federal Constitution and amendments and laws;

Whereby great wrong, injury and damage have come to plaintiffs in error, Charles E. Cross and Samuel C. White, respectively, &c.;

Therefore they pray for a reversal of the judgment of said Superior and Supreme Courts of the State of North Carolina.

W. R. HENRY,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

No. 1493.

CHARLES E. CROSS AND SAMUEL C. WHITE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

MOTION FOR CONTINUANCE.

The plaintiffs above named come into Court now here, by W. R. Henry, their attorney, and respectfully pray this honorable Court that the above-named case be continued until the second Monday in October, 1889, the day named in the writ of error for the return thereof:

For that said plaintiffs cannot sooner safely come to a hearing in said case upon the merits thereof. The plaintiffs are not ready because the plaintiff Cross has had to make all arrangements, employ all counsel, and pay all expenses incident and necessary to the proper presentation of plaintiffs' case to the Supreme Court of the United States, and has been unable to perfect his preparations for said

hearing because of the protracted and critical illness of his aged father, who is his only stay and support in this his extremity.

Not to continue the case as prayed may do plaintiffs great hurt, while to continue the case cannot possibly injure defendant.

Wherefore plaintiffs in error humbly pray the continuance of said case.

Respectfully submitted,

W. H. HENRY,
Attorney for Plaintiffs.

Supreme Court of the United States.

No. 1493.

CHARLES E. CROSS AND SAMUEL C. WHITE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

Adoption of Case Docketed by Defendant so far as Same is Correct, and Motion for Certiorari.

The plaintiffs come into Court now here, by W. R. Henry, their attorney, and adopt as their own so much of the case docketed by defendant as is correct; but they allege that the transcript of record sent up from the supreme court of North Carolina is materially defective, for that—

I.

It nowhere appears upon said transcript that the grand jury brought the bill of indictment in said case into open court.

II.

It nowhere appears upon said transcript upon what day the judgment of the lower court, as affirmed by the supreme court of North Carolina, is to begin, which is necessary under the law of North Carolina as well as in other States of the Union.

III.

The certificate annexed to the judgment of the supreme court of North Carolina (Transcript, 27), the certificate to the opinion of the supreme court of North Carolina (Transcript, 39), the certificate to the bond required by this Court (Transcript, 42), and the certificates to the various exhibits in this case (Transcript, 25–26) are insufficient, not in accordance with law, and do not appear as they ought to appear upon the record below

Wherefore plaintiffs in error respectfully pray this honorable Court that its writ of certiorari may issue to the supreme court of North Carolina, requiring the clerk thereof to send up a perfect transcript of the record herein, and to do all other things herein that may be necessary, &c.

Respectfully submitted,

W. R. Henry,
Attorney for Plaintiffs.

Supreme Court of the United States.

No. 1084.

CHARLES E. CROSS AND SAMUEL C. WHITE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

Affidavit Supporting Motion for Certiorari.

W. R. Henry, attorney for the Plaintiffs in Error in the above-named case, being duly sworn, says that the facts stated in the motion for a certiorari, filed in said case, are true.

W. R. HENRY,
Attorney for Plaintiffs in Error.

Sworn and subscribed before me this, the twenty-first day of October, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. —.

CHARLES E. CROSS AND SAMUEL C. WHITE,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA, DEFENDANT IN ERROR.

Error to the Supreme Court of North Carolina.

And now comes the defendant in error, by Theo. F. Davidson, Attorney General of North Carolina, and moves the Court to advance this writ upon the calendar of this Court in order that the argument thereon may be submitted and the questions presented may be determined at the earliest day consistent with the convenience of the Court.

The following reasons are respectfully submitted in support of the motion:

1. The plaintiffs in error were convicted in the superior court of North Carolina for forgery after a long trial. They were, respectively, the president and cashier of the State National Bank of Raleigh, North Carolina, a banking asso-

ciation of long standing and high repute, having a large number of depositors, among others, the fiscal agents of the State of North Carolina. The plaintiffs in error fled the country, were apprehended in Canada, brought back, tried, convicted, and on appeal to the supreme court of the State the judgment was affirmed.

There was a total failure of the bank, and consequently great loss to individuals and the State, attended with much excitement. Any delay, which may be avoided in the hear- of the cause, will be unfortunate.

2. There are other indictments pending against the plaintiffs in error for like offences, involving some of the same questions presented on this writ, and the State courts are unwilling to proceed with them until the determination by this Court.

THEO. F. DAVIDSON,
Attorney General, North Carolina.

FILED
MAR 15 1889
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1493.

CHAS. E. CROSS AND SAM'L C. WHITE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Brief of the Defendant in Error.

THEO. F. DAVIDSON,
Attorney General North Carolina.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1493.

CHAS. E. CROSS AND SAM'L C. WHITE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Brief of the Defendant in Error.

STATEMENT OF FACTS.

The plaintiffs in error, who were the President and Cashier of the State National Bank of Raleigh, were indicted in the Superior Court of Wake county, North Carolina, at March Term, 1888, for forgery. The bill contained four counts: the *first* charging the forgery "with intent to defraud," generally; the *second* charging the uttering and publishing the alleged false and forged instrument; the *third* charging the forgery with intent to defraud the said State National Bank of Raleigh, and the *fourth* a conspiracy to forge and utter, &c., with "intent to defraud" generally. (Record 1.)

It will be unnecessary to consider the third and fourth counts, inasmuch as there was in effect a verdict of not guilty as to them.

At July Term, 1888, the defendants were arraigned and interposed a plea in abatement (Record 5) to the jurisdiction

of the Court, in substance, for that "at the time of the alleged conspiracies and forgeries the State National Bank of Raleigh was a National Banking Association, duly organized and acting under the laws of the United States; * * that the alleged conspiracies and forgeries were entered into and committed by the defendants for the purpose of supporting, sustaining and making certain false entries in the books of the said National Bank, and with the intent to deceive the agent of the United States, to-wit, the Bank Examiner of the United States. That the said forged note was never uttered or published in any way, or to any other person, nor was there any intent or attempt to do so. That the said forged note was entered upon the books of the State National Bank as the property of the Bank, and was placed among its assets by the defendants for the purpose and with the intent aforesaid." To this plea the State demurred (Record 6); and the demurrer being sustained, the defendants pleaded not guilty.

After the case had been submitted to the jury, they announced to the Court that it was impossible for them to agree, and requested to be discharged (Record 7). Thereupon the Judge directed the jury to be brought into Court, and after asking them as a body if they could agree, and receiving a negative response, proceeded to poll them, asking each juror, as his name was called, "What say you, are the defendants or either of them guilty in manner and form as charged in the bill of indictment, or not guilty?" and it appeared that all of the jurors had agreed that both of the defendants were guilty as to the first two counts in the bill of indictment, but two of the jurors said "not guilty" as to the third and fourth counts. The Solicitor then, with leave of the Court, but over the objection of the defendants, entered a *nolle prosequi* as to the third and fourth counts, and the jury being so informed retired, and after further consideration, returned a verdict of guilty, (Record 8.)

Judgment being pronounced, the defendants appealed to

the Supreme Court, which affirmed the judgment, (Record 9.) See opinion of the Court, (Record 28.) The defendants then sued out a writ of error to this Court, and now, in substance, assign as error:

1. The judgment sustaining the demurrer to the plea to the jurisdiction; and

2. The action of the Court in polling the jury before verdict, and receiving the verdict under the circumstances.

ARGUMENT.

I.

The offence charged in the indictment, and of which the defendants therein were convicted, is the *common law crime of forgery*.

The statutes of North Carolina in reference to this crime—§§ 1029 and 1191, The Code of N. C. (1883)—create no new offence, but only prescribe the punishment and the form of the indictment therefor.

Section 1029 provides that "If any person, of his own head and imagination, * * * shall wittingly and falsely forge and make, * * * or shall show forth in evidence, knowing the same to be forged, any deed, * * * bond, promissory note, * * * with intent to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the penitentiary or county jail not less than four months nor more than ten years, and fined, in the discretion of the Court."

Section 1191 provides: "In any case where an intent to defraud is required to constitute the crime of forgery, * * * it shall be sufficient to allege in the indictment an intent to

defraud, without naming therein the particular person or body corporate intended to be defrauded; and on trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any State, county, city, town or parish, or body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person."

This common law offence is entirely separate and distinct and wholly independent, and in no sense a constituent part of the statutory crimes created by Rev. Stat. U. S., §§ 5209, 5418 *and* 5479, *and is cognizable and cognizable only in the State Courts.*

It may be conceded, as seems to have been done in the opinion of the Supreme Court of North Carolina in this case, that the State courts have no jurisdiction to try and punish the crime of false entry under § 5209, Rev. Stat., and specific forgery, denounced by §§ 5418 and 5479; and, perhaps, if the forgery of this note was essential to and inseparable from the false entry, the same result would follow. But the crime of false entry does not depend upon forgery. It may be perpetrated and completed without any such act, just as a forgery may be perpetrated without a false entry.

To illustrate: if in the case now before the Court, the note had been forged and placed among the assets of the bank, but no entry thereof was made on the books of the bank or reference made thereto in any report or statement required of the officers, could it be pretended that the Courts of the United States had acquired jurisdiction and thereby ousted that of the Courts of North Carolina to punish this forgery? Clearly, the Federal Courts could not, under this state of facts, acquire jurisdiction by virtue of section 5209, because that is only directed against *false entries and false statements.*

On the other hand, suppose the false entries had been made without any preliminary forgery of the note, can there be any doubt that the offence under section 5209 would be complete?

Another illustration: Suppose the plaintiffs in error,

with intent to deceive and defraud the Bank Examiner, had made a false entry on the books that $10,000 in cash was in the bank vaults, and in order to support this false entry, had burglariously entered the house of a citizen in North Carolina and stolen that sum and placed it in the bank vault, can it be doubted that the State Courts would have jurisdiction to try and punish the burglary?

Even in those cases where *one and the same act* is made criminal by both the State and Federal government--except in that limited class where exclusive Federal control is conferred by the Constitution over the subject-matter—the offender may be tried and punished in either jurisdiction. *Fox* v. *The State of Ohio*, 5 How., 410 (432).

"Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two Sovereigns, and may be liable to punishment for the infraction of the laws of either. *The same act may be an offence or transgression of the laws of both.* Thus, an assault of the Marshal of the United States and hindering him in the execution of legal process is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State—a riot, assault, or murder—and subject the same person, under the State laws for a misdemeanor or felony. That either or both may, if they see fit, punish such an offender cannot be doubted." *Moore* v. *Illinois*, 14 How., 13 (20).

A noteworthy application of this principle will be found in *Coleman* v. *Tennessee*, 97 U. S., 509.

The case of *Ex parte Haughton*, 7 Fed. Rep. 657, 12 Myers Fed. Dec., 421, clearly illustrates the principle we have announced. The petitioner in that case had been convicted of counterfeiting National Bank notes. He applied to the U. S. District Court for the writ of *habeas corpus*, and asked his discharge on the ground that the State Court had no jurisdiction and consequently its judgment was void. It was held that the State Court had no jurisdiction of this

offence, and in the opinion this language is used: "It might be, or claimed to be, that making any act punishable under the laws of Congress would prevent the States from punishing a different offence involved in the same act. An assault upon a Marshal to obstruct his service of process, *would be punishable under the title for the obstruction, but not for the assault; the assault might be punishable under the State laws, but not the obstruction. The title makes certain offences against the laws of the United States punishable. This section seems to mean that making them so punishable shall not prevent the States from taking hold of any offences which may be involved that are contrary to the State laws, and not cognizable under the United States laws, and punishing them.*" This case is an affirmance of the rule laid down in *Moore* v. *Illinois*, 14 How. *supra*, and, unless the rule is departed from, it is decisive of this question. The plaintiffs in error have committed two crimes. Of the *false entry* the State Court cannot and did not try to take jurisdiction. Its punishment belonged to the Federal tribunals. Of the *forgery*, the Federal Court could not take jurisdiction, for the punishment for it belonged to the State Court. In the illustration put by the Court in *Moore* v. *Illinois*, *supra*, the assault on the Marshal in obstructing him in the service of process might with much reason be said to be an integral and necessary part of the Federal offence, for he could not be obstructed unless he was assaulted. Yet the Court says that in that case it cannot be doubted that the State Court could try the offender for the assault. How, then, can it be that the State Court in this case is ousted of its jurisdiction to try the forgery, which certainly is not as much an integral part of the false entry as an assault is to the obstruction of an officer?

"It may be generally said," remarked Dr. Wharton, in the 1st vol. of his Criminal Law, § 565 (w), "that the fact that the two offences form part of the same transaction, is no defence, when the defendant could not have been convicted, at the first trial, on the indictment then pending, of the offence charged in

the second indictment." * * * "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction, the plea is generally good, but not otherwise." To the same effect is *Com.* v. *Bateman*, 105 Mass., 53.

Applying this rule to the case under consideration, we may ask, if the plaintiffs in error had been indicted in the Federal Courts for false entry under § 5209, could they have been convicted of the offence of forgery? Or suppose that the State of North Carolina had among its statutes an act similar to § 5209, in regard to its State banks, could the plaintiffs in error, under this indictment, be convicted under that statute? Clearly not, the offences being of the same grade, there could be no merger, (1 Wharton Cr. Law, § 564 (v.), and for the further reason, that the evidence to support the one indictment would be entirely different from that required on the trial of the other.

If the position assumed by the plaintiffs in error is correct, they have secured immunity from punishment from one of the gravest offences against the laws of North Carolina by virtue of an act of Congress, which cannot punish them therefor, and will not allow the State to do so.

"The punishment of a cheat or a misdemeanor practiced within the State and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions, which would be regular or justifiable." *Fox* v. *Ohio*, 5 Wheaton, 434.

Again it is said, Miller, J., in *U. S.* v. *Ward*, 12 Myers Fed. Dec., 437, "It (Congress) may establish postoffices and post-roads, and may punish robbing its mails, but cannot punish counterfeiting the issue of State banks, or robbing express companies. * * * The authority of Congress to provide for the punishment of crime is limited to such subjects and circumstances as are peculiar to the Federal government."

II.

It is also contended for the plaintiffs in error that the jurisdiction of the State Court is ousted by the provisions of §§ 5418 and 5479 of the Revised Statutes.

The construction placed upon these sections by the Supreme Court of North Carolina in its opinion in this case is so manifestly correct that no argument or citation of authority is thought to be necessary. Any other interpretation would make it impossible for the State Courts to punish any forgery, no matter when or how committed, with which a national bank may have become connected in the conduct of its business. It cannot be that forging a note by which a national bank is defrauded is a forgery against the United States government within the meaning of these statutes.

III.

The remaining assignment of error in respect to the manner of polling the jury and receiving the verdict is not a federal question which this Court can review, even if the action of the State Court was erroneous in law. It is not claimed that there is any provision in the Constitution or statutes of North Carolina which deprives the plaintiffs in error of any right guaranteed to them by the Constitution of the United States.

"The provisions of the 14th amendment of the Constitution all have reference to the *State* action exclusively. * * * * * It is the *State* which is prohibited from denying to any person the equal protection of itslaws." *Virginia* v. *Rives*, 100 U. S., 318.

"Certainly a State cannot be deemed guilty of a violation

of this constitutional obligation simply because one of its courts has made an erroneous decision. The Legislature of a State performs its whole duty under the Constitution when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings." *Arrowsmith* v. *Harmoning*, 118 U. S., 194; Civil Right Cases, 109 U. S., 3.

What constitutional right of the plaintiffs in error was abridged by the conduct of Court? What immunity was destroyed? The result of the polling of the jury was in fact beneficial to the defendants on the trial, as it secured an acquital on two of the counts. Are we to understand that the plaintiffs in error insist that they had a right under the Constitution of the United States *to a verdict of guilty* on these two counts, and that the State Court wantonly deprived them of this precious right? Or are we to conclude that they insist, that under the Federal Constitution, they had a vested right in a *hung jury*, of which they were unlawfully deprived?

That the effect of the *nolle prosequi*, under the circumstances, is an acquital as to the counts to which it pertains, has long been the settled law in North Carolina. *State* v. *John*, 7 Ired., 330; *State* v. *Bower*, 94 N. C., 910; *State* v. *McNeill*, 93 N. C., 552; *State* v. *Thompson*, 95 N. C., 596; *State* v. *Taylor*, 84 N. C., 773.

But the action of the State Court was not erroneous. It was the exercise of a sound and wise discretion on the part of the trial Judge, in the discharge of his duty to bring about a verdict one way or the other, and thereby put an end to the litigation. The result, in this instance, vindicates the action of the Judge. The jury, without any undue influence, had agreed upon the two first counts. The issues upon them were settled without reference to a possible ver-

dict on the others. No possible harm could come to the defendants by this course.

In fact the Judge had followed a precedent adopted in *State* v. *Curland*, 90 N. C., 668, where exactly this practice was approved.

But it is insisted that this matter was entirely one for the consideration of the tribunals of the State, and having been decided by them, their decision is not now open for consideration in this Court. *Spies* v. *Illinois*, 123 U. S., 131.

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